27 JUNE SCC MEETING ON TITLE I OF S.2525

AGENDA

I. Introductory Statement

II. Issues for Decision

A. Relating to Status, Role, and Authority of the Proposed Director of National Intelligence;

B. Relating to Oversight of Intelligence Activities;

C. Summary of Information Issues

Attachments

INTRODUCTORY STATEMENT

The attached materials relate to Title I of S.2525. These materials consist of:

Tab A. A brief statement of issues requiring decision by the SCC, either because the working group is in disagreement about the proper resolution of the issues or because, in the case of the oversight issues, the IOB favors a resolution that differs from a recommendation upon which the working group is agreed.

Tab B. A longer paper including an overview of Title I, an explanation of the working group decision to exclude from consideration at this juncture certain provisions of Title I that are in the nature of restrictions on intelligence activities, and a fuller discussion of the issues summarized in Tab A. Also included in this paper are discussions of information issues about which there is a working group consensus but which the SCC may wish to consider nonetheless. Some of the information issues are of obvious importance, see for example the issue regarding the coninued role of the DNI as head of CIA (the working group opposes the provision in Title I that would authorize a transfer of this function away from the DNI) and the issue regarding the general provisions governing the obligations of heads of intelligence entities to report to the SSCI and HPSCI (the working group favors acceptance of these provisions, with slight modification but without insisting on a reference to "procedures to be established by the President"). The attachments to Tab B consist of:

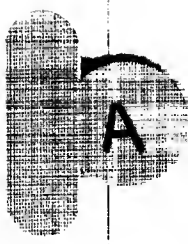
Tab 1. A copy of Title I minus the provisions that the working group would leave aside for later consideration in conjunction with Title II.

Tab 2. A copy of Title I that is marked up to reflect the changes that in the agreed view of the working group should be urged on the Congress.

Tab 3. A subsection-by-subsection comparison of the principal oversight provisions of Title I (Sections 151 and 152) and the counterpart provisions of E.O. 12036.

Tab 4. An IOB memorandum dated 22 May 1978 setting forth its views on Title I, and a supplemental IOB memorandum dated 22 June.

Tab 5. A summary of the various reports to the SSCI and HPSCI that would be required by Title I unless reliance was placed on the general reporting provisions, as recommended by the working group.



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STATEMENT OF ISSUES REQUIRING SCC DECISION

A. Relating to the Status, Role, and Authorities of the DNI (See Part V of Tab B)

First Issue: Should the DNI be changed from Level II to Level I

Background: The bill places the DNI at Executive Schedule, Level I. Placing the DDNI at Level II and the ADNIs at Level III follows upon the rank of the DNI. The only positions now at Level I are the 12 cabinet secretaries and the Special Representative for Trade Negotiation. The Director of Central Intelligence is at Level II along with Deputy Secretaries of the various departments; the Chairmen of the Council on Economic Advisers, the Board of Governors of the Federal Reserve, and the Nuclear Regulatory Commission; the Directors of OMB, OST, USIA, ACDA; the Secretaries of the Military Departments; and the Administrators of NASA, AID, VA, FAA and NSF.

Points in favor: Including the DNI among the officials at Level I of the EPS will place that position at a level held now by members of the President's "Cabinet" and the Special Representative for Trade Negotiation. In effect, the DNI would be accorded Cabinet-level status and be supported by a group of senior officials in a framework roughly equivalent to the organization of the Cabinet departments.

It is apparent that the "rank" of the DNI must be based upon a thorough consideration of the extent and importance of the authorities and responsibilities vested in that office. Neither Executive Order 12036 nor its predecessor E.O. 11905 did or could effect an increase in the level of the DCI despite the sizeable elaboration and enhancement of the responsibilities of that office which those orders accomplished. The DCI even now performs substantial and unique functions as the principal intelligence officer of the government, as the central figure in the management and coordination of activities and programs involving multiple departments and agencies and of vital national concern, and, as is not the case with the Special Trade Representative, as head of a sizeable agency with significant responsibilities relating to the national security and foreign policy interests of the U.S. The DCI now chairs the Policy Review Committee which is made up of Cabinet-level officers, has frequent official interaction on an equal basis with officers at that level, and deals directly, as do those officers, with the Congress and the President. With these responsibilities supplemented by incidentally necessary authorities, formalized and cast in statute, there is much to be said for establishing a DNI at Level I to remove any hint of an impediment to their full performance.

Points against: Since the DNI is not a cabinet member he should not be given cabinet rank. The principal intelligence officer compares more closely to the chief economic officer, the chief budget officer, and the chief science advisor, all of whom perform "service" functions and all of whom are at Level II. Breaking into Level I for a second non-cabinet member would create pressure to elevate other non-cabinet members. The performance of the DNI's functions will not necessarily be enhanced by elevating the position from a Level II to a Level I. The DNI's authority will rest on the specific statutory provisions for duties and responsibilities, elevating the DNI to a Level I may cause a political backlash. The DNI may appear to have aggregated too much power and to be dealing as an equal at the highest policy levels, rather than providing information so that the policy makers can function more effectively. This may cause a public reaction against the apparent power of the intelligence community and be reflected in the stringency of the restrictions Congress legislates for the intelligence community.

Agency positions:

In favor:	CIA
Against:	DOD
Reserved:	All others

NFIB position:

None

Second Issue: Should the Assistant Directors be confirmed by the Senate

Background The bill provides for a Deputy Director and five Assistant Directors, all of whom would be Presidential appointees confirmed by the Senate. The positions of Deputy Director and the Assistant Directors would be set at Levels II and III to follow the increased status of the Director.

Points in favor: Presidential appointment and Senate confirmation may make for increased independence on the part of these officials, as well as increased public confidence in their qualifications. To the extent the bill requires confirmation of the DNI, DDNI and other officials in the intelligence structure, such as the general counsels of CIA and NSA, the political aspects of the confirmation procedure are of little concern.

Points against: Senate confirmation was added by the drafters of the bill to permit a political examination of the credentials of the persons the President wishes to appoint to these positions. This political review decreases the flexibility the President has in filling these positions with the most capable intelligence professionals or outside persons that are available. Intelligence positions should be kept as free as possible of political influence. It would be unfortunate if career intelligence professionals who desired to move up into these jobs had to be concerned with taking politically acceptable positions on substantive matters (or avoiding particular kinds of assignments) in order to remain eligible.

Agency positions:

In favor:	CIA
Opposed:	DOD
Reserved:	All others

NFIB position:

None

Third Issue: Should the DNI be given any authority with respect to the formulation of intelligence requirements

Background: The bill provides that

> The Director shall coordinate and direct the collection of national intelligence by the entities of the intelligence community by developing such plans, objectives and requirements for the entities of the intelligence community as are necessary to meet the intelligence needs and priorities established by the National Security Council. (Sec. 114(e)(1)).

The Executive Order contains a different statement of these responsibilities. It provides that

> The PRC shall establish requirements and priorities for national foreign intelligence. (E.O. §1-202(a)).
>
> The NITC shall be the central mechanism by which the Director of Central Intelligence translates national foreign intelligence requirements and priorities developed by the PRC into specific collection objectives and targets for the Intelligence Community. (E.O. §1-502(a)).

Points in favor: While it is true that the language in the bill departs from the language of the Executive Order, the net result is a clarification rather than an augmentation of the Director's functions and authorities. Under the bill it would continue to be the NSC's responsibility to establish intelligence needs and policies. Tasking would continue to be the Director's responsibility. The development of requirements, even if they be only subsidiary to more general requirements fixed by the NSC, is a necessary aspect of the Director's tasking and coordination functions. The bill's statement of the Director's authority would not free him from NSC direction with respect to requirements and would not give him undue control over collection resources, any more than is the case under the Executive Order.

Points against: The Executive Order was careful to distinguish between requirements or needs for intelligence, which would be established by users not producers, and collection targets and objectives, which would be established by the DCI in his role as a coordinator. The bill upsets this careful delineation by placing authority over "requirements" in the DCI and authority over "needs" in the NSC.

The Executive Order was intended to be a careful restructuring of the Intelligence Community and a central feature of that restructuring was the placement of authority over determinations as to needs for or requirements for intelligence in the hands of the users of intelligence. One of the primary criticisms of the intelligence community, voiced perennially and made known once again in the PRM-11 exercise, is that the producers produce what they can do best and not what intelligence users need most. The PRC functions with respect to requirements were a key part of the Executive Order and the Executive Order language should be followed exactly in this respect.

Agency positions:

In favor:	CIA		
Opposed:	DOD	Reserved:	All others

NFIB position:

In favor, with DOD in dissent

Fourth Issue: Should the provision granting DNI authority to insure "usefulness" of intelligence information be retained without modification

Background: Section 114(g)(2) of the bill authorizes the DNI to establish procedures to increase the usefulness of national intelligence information to departments and agencies. The Executive Order does not have a counterpart provision. It provides simply that "the Director of Central Intelligence shall have full responsibility for...dissemination of national foreign intelligence." (E.O. §1-603).

Points in favor: The proposed language permits flexibility in determining what procedures are necessary. Such procedures will extend beyond mere type-face and other "packaging" elements, to the manner and rapidity of publication and dissemination, designation of appropriate recipients, desired levels of classification, and other considerations that are relevant for the purpose of assuring consumers receive information that is useful to them. This authority is not new but is a necessary part of the DNI's overall responsibility for the production of national intelligence.

Points against: The current language permits flexibility beyond just requirements for dissemination and should be changed to be limited to dissemination. It is unclear from the context of the bill what "procedures to increase the usefulness" of intelligence would cover. During the course of the working group debate on this matter, it was pointed out that Section 114(g) is intended to cover only dissemination, and in that regard to flesh out Section 1-603 of the Executive Order, but the language could be interpreted to allow the DNI to exert control over collection activities. Section 114(g)(2) could be made more clear by relating the "procedures to increase the usefulness" of intelligence directly to the DNI's dissemination responsibilities. This could be done in two ways:

Alternative A: state directly that the DNI may establish "dissemination procedures" to increase the usefulness...

Alternative B. describe dissemination procedures by providing that the DNI may extablish "formats for reporting information that will" increase the usefulness...

Alternative A will accommodate all of the procedures envisioned with respect to dissemination that are now a part of the DNI's responsibility. Establishing procedures to increase usefulness, without an appropriate limitation to dissemination, encroaches on the line authority of the agencies and on the responsibilities of the PRC to "develop policy guidance to ensure quality intelligence." E.O. §1-202(c).

Agency positions:

In favor:	CIA
Opposed:	DOD
Reserved:	All others

NFIB position:

In favor, with DOD in dissent

Fifth issue: Should the bill contain a definition of intelligence-related activities and give the DNI a right to review such activities

Background: Section 104(18) of the bill contains a definition of "intelligence-related activity" as

> any activity that is --
>
> (A) a department or tactical intelligence activity that has the capability to provide national intelligence or to support national intelligence activities;
>
> (B) is devoted to support of departmental intelligence activities;
>
> (C) is conducted for the purpose of training personnel for intelligence duties; or
>
> (D) is devoted to research on or development of intelligence capabilities.

This definition is implemented in the bill in only one section. Section 114(q) provides:

> In order to carry out the Director's duties under this title, the Director shall review all research and development activities which support intelligence or intelligence-related activities of the Government and may review all the intelligence and intelligence-related activities of the Government.

The Executive Order does not define intelligence-related activities. As to authority, the nearest Executive Order counterpart is the provision requiring the Secretary of Defense to:

> Together with the Director of Central Intelligence, ensure that there is no unnecessary overlap between national foreign intelligence programs and Department of Defense intelligence programs and provide the Director of Central Intelligence all information necessary for this purpose. (Section 1-1111)

Points in favor: The DNI is given broad authorities and responsibilities as to all national intelligence activities. Even as revised, Section 114(b) charges the DNI with broad and varied coordination responsibilities, 114(c) requires the DNI to review continuously all existing and proposed national activities to ensure their proper and efficient regulation and administration, and 114(e) imposes general

responsibility on the DNI for collection of national intelligence while 114(f) and (g) do the same as to its production and dissemination. These responsibilities cannot be performed fully and effectively without authority to inquire into the existence and nature of activities which may be parallel, duplicative, or necessary and more appropriate to national versus departmental activities. The authorities provided in other portions of Title I are all limited in one way or another to "foreign" or "national" intelligence. Section 114(p), while seemingly a broad authority, is limited to inquiries necessary to perform the DNI's "duties." Those duties are essentially restricted to "national" intelligence and it may be argued this provision furnishes no authority to inquire into departmental programs. Section 114(p) may be sufficient and allow the deletion of Section 114(q) if modified to allow the DNI to obtain information pertaining to "intelligence activities" as well as information necessary to the performance of the DNI's duties.

Points against: All references to intelligence-related activities should be deleted from the bill. Any reference to these activities only widens the scope of the intelligence committees' inquiries and makes permanent a concept that was invented for specific budgetary purposes.

Deletion of Section 114(q) and Section 104(18) will not adversely affect the powers of the DNI.

The argument against this authority is not based upon the premise that the DNI should be strictly limited to "national" intelligence activities and should have no authority whatsoever to determine whether various departmental and national activities are duplicative. This type of review is in fact done now. However, the authority in Section 114(q) is too broad for this purpose, especially since under Section 112(a), as revised, the President will have the authority to designate additional national intelligence activities from among the foreign intelligence activities of the government, Section 114(e)(f) will enable the DNI to establish procedures, in coordination with the entity head, to increase the national intelligence contribution of entities outside the intelligence community, Section 114(p) will allow the DNI to obtain information from any entity when necessary to perform the DNI's duties, and Section 115 will require all entities to furnish all national intelligence to the DNI. These sections will provide the DNI with sufficient authority to inquire into a broad range of activities and, together with a flexible revised definition of the "intelligence community," will allow the identification and designation of additional activities as national intelligence activities when appropriate.

Agency positions:

In favor:	CIA
Opposed:	DOD
Reserved:	All others

NFIB position:

Favored the development of alternative language

Sixth Issue: This issue has to do with the DNI's budget authority and has three parts

a. Is the bill's broad statement of the authority sufficient, making the more specific provisions unnecessary

b. Should the fencing provision be deleted

c. Should the proposed reprogramming provision be deleted

Background: Section 121(a) makes a broad general provision for the DNI's budget authority:

> The Director shall be responsible for the preparation and approval of the national intelligence budget presented to the President through the Office of Management and Budget, and, after approval [by the President] of such budget, for its presentation to the Congress.

Section 121(a) also contains very specific provisions with respect to how the DNI is to carry out his general budgetary responsibilities. Subsection (1) deals with guidance to be provided by the DNI to agencies; Subsection (2) deals with the actual preparation of the budget after review of agency submission; Subsection (3) deals with presentation to the President; and Subsection (4) provides for reporting to congressional committees.

Section 121(b) contains a broad direction to the departments and agencies to submit to the DNI budgets in the form directed by the DNI and to make available all information needed by the DNI.

Section 121(c) requires that departmental budget decisions not be allowed to offset national budget determinations. An addition proposed by the CIA would transplant the reprogramming requirement from the Executive Order to the statute.

The Executive Order provides details similar to but not the same as Section 121(a). The Order does not contain any fencing provision such as Section 121(c) although such a provision was frequently urged by the DCI. The Order does contain a reprogramming provision such as the addition that is urged by CIA.

Points in favor: The provisions with respect to budgetary authority should be general and broad enough to encompass all that was given to the DCI in the Executive Order, but should avoid specific detail where

possible in order to preserve flexibility for the President in conducting the budget process. The general authority in the first sentence of Section 121(a) is sufficient. The four subsections provide no additional authority. They may, however, with construction and practice over the years add substantial restrictions that will detract rather than enhance the DCI's powers. The provision for fencing should be deleted because it was specifically not provided for in the Executive Order and is an inappropriate level of detail for a statute. The provision for reprogramming should be deleted because, although appropriate for an Executive Order that can be changed by the President at any time, it is too inflexible for a permanent statute. The DCI has reprogramming authority under the Executive Order and so long as the President supports such an authority, it will continue. Engraving it in a statute is unnecessary.

Points opposed: The same considerations of certainty and permanency which compelled the inclusion of the implementing authorities of subsections 121(a)(1) through (4) in the Executive Order also argue for their inclusion here. The Director's functions with respect to the national intelligence budget are of central importance in the statutory scheme, just as they are in the Executive Order definition of his role, and his authorities in this area should be spelled out rather than left to be derived by inferences, some of which may be disputed. If these authorities are retained, the additional Executive Order authority to oversee reprogramming decisions should be inserted into this chain of authorities in order to control subsequent reshaping of budget decisions. The provisions of Section 121(c) requiring budget determinations should be retained. While there is no precise counterpart to this provision in the Executive Order, there are provisions in the Order exhorting particular officials to the same end, and such a safeguard is a desirable and necessary adjunct to the national intelligence budget authorities, again to control subsequent reshaping of that budget.

Agency positions:

In favor:	DOD
Opposed:	CIA
Reserved:	All others

NFIB position:

Opposed, with DOD in dissent.

Seventh Issue: Should the Director retain the authority to levy analytic tasks that is granted by the Executive Order

Background: Section 114(f)(3) of the bill provides authority for the DNI to obtain the services of other entities in the intelligence community for "analytic assistance." This section provides:

> The Director...shall--
>
> obtain, in consultation wtih the head of any entity of the intelligence community, such analytic assistance from that entity as is necessary for the Director to fulfill the Director's responsibilities under this subsection [which deals with the production of national intelligence].

The Executive Order contains a similar provision which the DNI would substitute for the language now in the bill.

> The Director shall...have authority to levy analytic tasks on departmental intelligence production organizations in consultation with those orgainzations.

This language is somewhat more limited -- it is limited to levying analytic tasks rather than obtaining analytic assistance; and it is limited to departmental intelligence production organizations rather than requiring assistance from the whole of any entity of the intelligence community.

The Department of Defense would substitute one of the following alternative provisions in order to ensure that the DCI could override the wishes of the head of an entity of the intelligence community only if the performance of the entity's other duties would not be affected adversely.

> Alternative A:
>
> obtain, in consultation with the head of any entity of the intelligence community, such analytic assistance from that entity as is necessary for the Director to fulfill the Director's responsibilities under this subsection without affecting adversely the performance of other authorized duties that entity.

Alternative B

obtain, with the concurrence of the head of any entity of the intelligence community, such analytic assistance from that entity as is necessary for the Director to fulfill the Director's responsibilities under this subsection.

Points in favor: The Executive Order provides that the DCI may obtain services from entities within the intelligence community after consultation with the head of the entity. The judgment as to whether an entity of the intelligence community should contribute services with respect to analytic tasks is one as to which the Director must exercise some effective control. Otherwise, any tasking by the DCI can be rejected by the head of any entity and the required mobilization of resources for the production of national intelligence cannot be accomplished. The production of national intelligence is the nation's first priority within the general category of intelligence production activities, and this provision ensures that the interests of national intelligence will not be subordinated to the interests of less vital departmental or tactical intelligence. Because presumably any task levied by the Director would interfere to some extent with the performance of other duties, the adoption of the DOD first alternative proposal would virtually nullify the Director's authority. The second DOD alternative proposal is no better because it would make the DNI entirely reliant on the good will of others who could veto his requests for any or no reason.

Points against: Provision in a statute for levying analytic tasks without the consent of the head of the department or agency is disruptive and unnecessary. The concept of an intelligence community, as opposed to an intelligence command, requires deference to the heads of departments and agencies in matters of line authority over their personnel and operations. The provision proposed by the bill or the Executive Order provision proposed as a substitute would permit the DNI to levy on any department any task no matter what the size, immediacy or manpower requirements. It would also permit the DNI to decide unilaterally which analytic centers will do what analytic work. Even if the capability to do a task existed or had been traditionally located in one agency, the DNI could shift this work entirely to another agency and agency head that objected would be in violation of the law. It would permit the DNI effectively to shut down analytic centers that were for some reason in his disfavor by so loading them with requirements for "analytic assistance" under this provision of the bill that they had little time or resources to do anything else. This provision puts the DNI in some degree of line control of all analytic centers and violates the underlying principle of competing analytic centers upon which the intelligence community concept is based.

Agency positions:

In favor:	CIA
Opposed:	DOD
Reserved:	All others

NFIB position:

Did not consider

Eighth Issue: Should the DNI have authority to terminate security clearances of contractors of intelligence community entities other than the O/DNI and the CIA

Background. Section 114(n) authorizes the DNI to terminate the security clearance of any contractor of any entity of the intelligence community whenever the Director considers such termination necessary or advisable in the interest of the national security of the United States. The Department of Defense would limit this authority to termination of the clearances of contractors of the Office of the Director of Central Intelligence and the Central Intelligence Agency. The DNI would consider a modification of this authority to permit termination of clearances only with the concurrence of the head of the department or agency concerned. Alternatively he would consider a modification limiting his termination authority to clearances for programs funded by the national intelligence budget.

Points in favor: As stated or modified this authority is a necessary adjunct to the statutory authority of the DNI to establish and maintain security standards and to protect intelligence sources and methods. These responsibilities extend beyond the O/DNI and CIA.

Points against: The DNI should not have authority to terminate security clearences of contractors of entities other than the O/DNI and CIA because the exercise of this authority might prohibit the use of affected contractors on non-intelligence projects which also require security clearances. Further it may be viewed as giving the DNI some line control over contracting practices of other departments and agencies.

Agency positions:

In favor:	CIA
Opposed:	DOD
Reserved:	All others

NFIB position:

Revise provision in case of contractors of entities of the intelligence community other than the O/DCI and CIA to allow the withholding of intelligence information from security delinquent contractors.

Ninth Issue: Should objection be raised to references in the bill to needs of the Congress for intelligence information and analysis

Background: There are three provisions in the bill that contain references to providing intelligence for the Congress that can be read as empowering the Congress to task intelligence agencies to produce intelligence specifically for the needs of the Congress. This reading would create a constitutional issue with respect to separation of powers. These three provisions also can be read to refer to the current situation in which intelligence which is produced to meet the needs of the Executive Branch and is "on hand" is produced on request of the Congress. Each of the three provisions could be rewritten to eliminate any reference to Congress and thus any doubt with respect to the separation of powers issue:

Sec. 103(4) now provides

It is the purpose of this Act --

to insure that the executive and legislative branches are provided, in the most efficient manner, with such accurate, relevant, and timely information and analysis as those branches need to make sound and informed decisions regarding the security and vital interests of the United States against foreign intelligence activities, international terrorist activities and other forms of hostile action directed against the United States.

possible re-write

It is the purpose of this Act --

to insure that accurate, relevant, and timely information and analysis is provided in the most efficient manner so that sound and informed decisions may be made regarding the security and vital interests of the United States and so that the United States may be protected against foreign intelligence activities, international terrorist activities, and other forms of hostile action against the United States.

Section 114(c) now provides

The Director shall, on a continuing basis, review all on-going and proposed national intelligence activities of the United States in order to insure that those activities are

possible re-write

The Director shall, on a continuing basis, review all current and proposed national intelligence activities of the United States in order to insure that those activities

properly, efficiently, and effectively directed, regulated, coordinated and administered; that these activities provide, in the most efficient manner, the executive and legislative branches with the information and analysis that those branches need to fulfill their responsibilities under the Constitution and laws of the United States; that those activities do not abridge any right guaranteed or protected by the Constitution or laws of the United States; that those activities fully support the national defense or foreign relations of the United States and that those activities are conducted in conformity with the provisions of this Act and the Constitution and laws of the United States. To achieve these ends, the Director shall provide such guidance to the head of each entity of the intelligence community as the Director deems appropriate.

are properly, efficiently, and effective directed, regulated, coordinated and administered.

(Delete the remainder as unnecessary in part, and inappropriate in part.)

Section 114(f)(1)
now provides

The Director...shall -- provide, under appropriate security procedures, the executive and legislative branches with accurate, relevant, and timely national intelligence needed by such branches to fulfill their responsibilities under the Constitution and laws of the United States.

possible re-write

Delete entire subsection as unnecessary given the broad authority in the introduction of Sec. 114(f) for the DNI to "be responsible for the production of national intelligence."

Points in favor: The language in these three sections permits, even if it does not require, an interpretation that Congress is giving itself the authority to levy requirements on the intelligence community. This would be a serious breach of the constitutional principle of separation of powers and should not be encouraged or even tolerated by the Administration. There is absolutely no benefit to the intelligence community in the language in these three sections that would be changed or deleted by the proposed re-write. There is no firm indication that the Senate Committee staff feels strongly about this language and even if the staff did, the members of the Committee may not. If the Congress wants to insist, the better way is to have them recognize the constitutional implications and to have opposing views aired fully. It is very important to note that language in the report is written by the Committee staff and that the Administration may have no control at all with respect to the legislative history. It is possible that, instead of making it clear that the Congress did not intend to levy on the intelligence agencies, just the opposite would happen.

Points against: The language in these three sections does not require or even strongly suggest a reading that gives Congress any power to levy on the intelligence agencies new requirements to meet congressional needs. The legislative history of these three sections can make clear that no such meaning is intended, and accpetance of the provisions can be conditioned on this sort of clarification. The basic concept, that intelligence be available to the Congress, is important to the drafters of the bill and there will be important (and adverse) political consequences from taking this language out. This concept is generally accepted today, without stirring any separation of power concerns, and unless given an unreasonable reading would not alter existing relationships between branches or provide leverage by which to affect those relationships. Most likely, Congress will insist on this language anyway, and if the Administration makes an issue out of this language that can be read either way, there is an increased likelihood of stronger language or adverse interpretative language in the report.

Agency positions:

In favor:	DOD
Opposed:	CIA
Reserved:	All others

NFIB position:

Did not consider

B. Relating to the Oversight of Intelligence Activities (See Part VI of Tab B)

First Issue: Should the IOB become a statutory entity

Background: The bill would establish the Intelligence Oversight Board as a statutory entity composed of three members subject to Senate confirmation. The Board would have a statutory charter closely paralleling its present Executive Order charter.

Points in favor: If the Administration were to urge deletion of this section, while the other oversight provisions are codified, it would raise serious questions about the President's commitment to vigorous, comprehensive oversight. Both the President and the Vice President have recognized the importance of putting the safeguards of an intelligence charter into statutory law. However, executive orders can be changed by the stroke of a pen and might be so changed by a subsequent Administration.

Objection has been raised to singling out the intelligence community for permanent oversight within the Executive branch. The fact is that intelligence is an extraordinary area of government. The inevitable secrecy, which diminishes normal opportunities for outside checks and balances, and the authorization for activites normally proscribed, make it very different from any other phase of governmental activity including foreign affairs or defense matters. The civil liberties stakes are high, as is the potential for embarrassment to the U.S. Government. For these reasons, E.O. 12036 recognizes the need for unusual restrictions on intelligence agencies.

Points against. The role of the IOB is still experimental to a degree, and there is a lesser imperative for the Board today than was the case at the time of its formation in February 1976, prior to the establishment of either the SSCI or HPSCI. Over the long term there may be no greater justification for a special Executive branch entity charged with oversight of intelligence activities than there is with respect to many other governmental activities having a potential for abuse, and in any event that the President's freedom to make or alter these arrangements as he sees fit should be preserved, unencumbered by a need to seek an amendment of a statute.

Agency positions:

In favor:	IOB
Opposed	CIA, DOD
Reserved:	All others

NFIB position;

Opposed

Second Issue: Assuming the IOB is given statutory recognition, should the bill include a detailed charter

Background: The IOB charter provisions in the bill are based on Executive Order model. Another option, if the IOB is to become a creature of statute, is simply to provide for its existence and leave all detail respecting its membership, functions, and authorities for later determination by the President.

Points in favor. The essential elements of any effective and credible oversight entity within the Executive branch are (a) the independence of its members, (b) jurisdiction to consider issues of both legality and propriety, (c) regular reporting by intelligence agencies, supplemented by authority to initiate inquiries on its own and (d) complete access to any informaiton necessary to perform its functions. All these elements must be taken care of in the legislation, which otherwise would not accomplish anything by simply creating an IOB.

Points against: The President can provide as well as the Congress for the essential elements of Executive branch oversight and therefore nothing is lost, and flexibility is promoted, by leaving the development of the charter in the hands of the President. If placed in the hands of the Congress, the charter that emerges may not be to the liking of either the President or the IOB, in which case the President's discretion to control these arrangements will have been needlessly sacrificed.

Agency positions

In favor:	IOB
Opposed:	CIA, DOD
Reserved:	All others

NFIB position:

Opposed

Third Issue. Should the bill require reports to the IOB on questions of "propriety"

Background: The bill essentially reiterates the Executive Order responsibility of the inspectors general and general counsels of intelligence community entities to report to the IOB any intelligence activity that raises questions of propriety.

Points in favor: The President should know of activities which comply with the letter of the law but which circumstances make inappropriate or objectionable for the U.S. to undertake, and the President has made it clear to the Board that he considers propriety to be an important area of oversight distinct from legality. Understanding that there would be extensive legal restrictions in the statute, and detailed implementing regulations, the SSCI still saw fit to include "propriety" as a separate oversight category, reflecting its feelings that there will continue to be gray areas and situations in which intelligence activities may be questionable even if lawful. As for the expressed concern about statutory liability for reporting under the imprecise standard of "propriety," the bill merely makes explicit what is implicit in the Executive Order, namely that officials need report only those activites that they "believe" to raise an issue of propriety. This is a subjective, good-faith standard, which is not onerous.

Points against: The term "propriety" is utterly indefinite, especially in the context of intelligence activities, having so many different possible meanings as to have no real meaning at all. To make this term the centerpiece of a statutory obligation is unfair to the officials on whom the obligation would be placed, opening them to second-guessing no matter which way they might make the necessarily subjective judgments about the propriety of lawful intelligence activities. Further S.2525 will create a comprehensive network of legal standards, meaning that there will be many fewer occasions calling for the application of non-legal standards in determining the appropriateness of particular intelligence activities. It should also be noted that the Board would not be deprived of its "propriety" jurisdiction by the proposed changes in the reporting standard. The Board could still conduct inquiries into matters that it might consider improper and obtain access to information on that basis. The only effect of the change would be to releave reporting officials from an obligation that is too vague to be understood.

Agency positions:

In favor:	IOB
Opposed:	CIA, DOD
Reserved:	All others

NFIB position:

Opposed

Fourth issue: Should the bill raise the Executive Order reporting threshold as to questions of legality

Background: The bill, picking up nearly identical Executive Order language, would require reports to the Board respecting intelligence activities that raise "any question of legality." The working group purposes that the standard be changed so that reports would be required only as to activities believed to involve "a serious question as to whether there has been a violation of law."

Points in favor: The reference to "any question" makes the standard unmanageable, given the large number and variety of legal matters with which the intelligence entities must and do deal. In practice a more narrow and realistic standard is applied. The addition of the word "serious" to the standard would be faithful to the intent of the requirement and make possible more honest compliance.

The other problem has to do with the word "legality." For example, the withholding of a document requested under the FOIA can raise serious legal questions (whether the facts justify the exemption, etc.) that are not within the intended oversight jurisdiction of the IOB. It would more accurately define that jurisdiction, by making it clear that possible illegality is the touchstone, if the reporting requirement were confined to questions that are both serious and relate to activities involving possible violations of law.

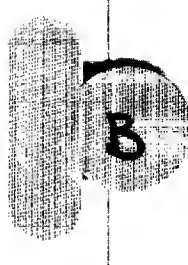
Points against: IOB reporting to the President is governed by a "serious question of legality" standard, and the proposed change would destroy the purposeful distinction between the broader range of issues to be considered by the Board and the narrower range of issues to be considered by the President. It is also unclear what "violations of law" encompass.

Agency positions:

Opposed: IOB
Reserved: All others

NFIB position:

In favor



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REPORT TO THE SCC

RE: TITLE I OF S.2525

I. INTRODUCTION

This report, prepared by the charter legislation working group, deals with Title I of S.2525. It excludes from consideration, however, those provisions in Title I which in the view of the working group are in the nature of restrictions on intelligence activities and for that reason are better left for consideration in conjunction with Title II. The provisions that have been set aside on this basis are sections 132-139 in their entirety and sections 131, 141, and 142, except insofar as these latter provisions simply state it to be a function of the National Security Council to review special activities and certain sensitive intelligence collection operations, and to advise the President with respect to counterintelligence, counterterrorism, and communications security policy.

By stripping out of Title I the provisions in the nature of restrictions on intelligence activities, as to which it is recommended that consideration be deferred, the working group does not mean to suggest that the restrictions in question are inappropriate, although some of them may be. Rather the objective is at once to simplify Title I by trimming it back to those provisions that relate to organizational and oversight arrangements, and to permit the SCC a fuller perspective when

it comes to consideration of Title II. As the working group sees it, the SCC will want to measure the aggregate as well as the separate impacts of the restrictions that S.2525 would impose, and that sort of an appraisal will be facilitated by considering the Title I restrictions in conjunction with those in Title II. The disadvantage of this approach is that the SSCI may see it as evidence of foot-dragging by the Administration on the aspects of S.2525 that are least to its taste, and as a retreat from Executive Order 12036, which contains some of the same restrictions. This is particularly true in regard to the review and approval of special activities and sensitive intelligence collection operations which as it is here recommended be removed from Title I. The working group believes that any such negative reaction may be avoided or blunted by careful explanations that our purpose is not to frustrate the enactment of appropriate restrictions but only to assure the most orderly analysis of the legislation.

II. OVERVIEW OF TITLE I

A copy of Title I, minus the provisions with which this report does not deal, is attached at Tab 1. Its caption is the "National Intelligence Act of 1978." It begins with a statement of findings (Section 102) and a statement of purposes (Section 103), two of the latter being (1) "to authorize the intelligence activities necessary for the conduct of foreign relations and the protection of the national security of the United States," and (5) "to provide for the appointment of a Director of National Intelligence, to delineate the responsibilities of such Director, and to confer on such Director the authority necessary to fulfill those responsibilities." The role and status of the DNI, and his relationship with CIA, are the subject of numerous subsequent provisions in Title I, the net result of which would be to implant in statute the two-hatted DCI concept recognized in both Executive Order 11905 and more recently in Executive Order 12036, and in some respects to augment the currently applicable authorities of the DCI.

A third stated purpose of Title I is to guarantee the accountability of intelligence community agencies to the President and to the Congress, and there are numerous subsequent provisions in furtherance of this purpose, including provisions that would create a detailed statutory charter for the Intelligence Oversight Board and spell out the oversight authorities of the SSCI and the HPSCI. An assortment of specific reporting requirements is associated with these oversight schemes, both of which are backed up by broad general statements concerning

the right of the IOB on the one hand and the two congressional committees on the other to receive intelligence information as a matter of course or on request. Other provisions give the Attorney General an enhanced role in the oversight of intelligence activities, together with a related function of assuring job protection for "whistle-blowers," and assign internal oversight roles to the general counsels and inspectors general within the intelligence community.

Section 104 contains a lengthy and rather complicated set of interrelated definitions. The working group believes that some of these definitions are unnecessary, at least in a Title I context, and that others should be conformed to definitions of the same terms appearing in E.O. 12036. There are no Executive order counterparts, however, for some of the key definitions in Title I, as for example "national intelligence," "national intelligence activity," "intelligence-related activity" (a definition which DOD would like to exclude from the bill, see discussion of issue 4.a in Part V of this paper), and "intelligence source" and "intelligence method." These terms are important because, among other things, their meaning controls the scope of the DNI's authorities and the scope of the activities that would be both authorized by and regulated under the bill. The definition of the "intelligence community" is also of obvious importance, and the working group is agreed that it should be revised.

Section 111 sets forth the basic authorization to conduct intelligence activities, which are placed under the "direction and control" of the NSC. It is also provided that such activities are not to be conducted otherwise than in accordance with the bill, making it the

exclusive legislative instrument for the regulation of these activities. The working group favors revisions, both in this section and in the definitions, delineating more clearly what activities are to be considered intelligence activities for purposes of the bill and making it more explicit that non-intelligence activities are not covered by the bill. These issues are of significance chiefly with respect to departments and agencies that have intelligence community components but that perform law enforcement, diplomatic or other non-intelligence functions side by side with intelligence functions.

Section 112 requires the President, with the advice of the DNI, to determine annually whether any activities in addition to those defined as such in the bill should be treated as "national intelligence activities." The Department of Justice has expressed concern that this provision, as written, would allow the counterintelligence activities of the FBI to become DNI-controlled functions through Presidential designation. The working group has attempted to meet this concern by recommended revisions that would have the effect of excluding counterintelligence activities from the definition of national intelligence activities.

Section 113 establishes an independent office, which has no statutory equivalent today, to be known as the Office of the Director of National Intelligence. It also establishes the position of DNI to head that office and Deputy DNI to assist the DNI in carrying out his functions and to act in place of the DNI in the event of the latter's absence or disability or in the event of a temporary vacancy. Both officers would

serve at the pleasure of the President, both would be subject to re-confirmation by the Senate at the end of six years, and neither could serve in one or both offices for more than a total of 12 years. Either one of the two offices but not both could be occupied at any one time by a commissioned military officer, whether in active or retired status, and any military officer serving in either capacity would be protected as to independence, rank, etc., by provisions closely paralleling the provisions of the National Security Act of 1947 that apply in these circumstances.

Section 114 sets forth the duties and authorities of the DNI, other than the budget authorities which are specified in Section 121. One of the enumerated duties is to act as Director of the Central Intelligence Agency, that being the head-of-CIA position established by Title IV.

Section 115 makes it a responsibility of heads of departments and agencies, not just those with intelligence community connections, to furnish national intelligence obtained by such departments and agencies to the DNI.

Section 116 provides for the appointment, subject to Senate confirmation, of no more than five Assistant DNIs to assist the Director in carrying out his functions. The DNI would be authorized to establish by regulation the order in which the Assistant DNIs would succeed to the status of Acting Deputy DNI or Acting DNI in the event of absence or disability vacancies in those offices. Not more than two of the Assistant DNI positions could be occupied at any one time by commissioned military officers.

Section 117 gives the President the option of separating the DNI from CIA. It makes the DNI's duties and authorities as head of CIA transferrable at the President's election to the Deputy DNI or any Assistant DNI, subject to certain conditions including prompt notice to the Congress and subject also to veto by a resolution of disapproval adopted by either the House of the Senate within 60 days of the notification. The working group favors the deletion of this entire Section.

Section 121 details the DNI's authorities with respect to the national intelligence budget and the corresponding obligations of heads of intelligence community entities. These provisions are after the pattern of E.O. 12036, although they are not identical.

Section 122 provides the annual authorization of the intelligence community budget and perpetuates in the hands of the DNI the existing authority of the DCI to account for the expenditure of funds on his own signature, so long as the purpose of the expenditure is lawful. The latter provision does not arm the DNI with a special spending power but rather concerns only the manner of accounting for expended funds.

Section 123 has to do with outside audits by the Comptroller General. It provides that all funds appropriated to intelligence community entities, and all activities of such entities and information relating to such activities, would be subject to financial and program management audit and review at the request of either the SSCI or HPSCI. Further it disclaims any limitations on any existing authority of any other committee of the Congress to request and obtain such audits, or any limitation of the authority of the Comptroller General to conduct

such audits on its own initiative, without request from any committee of Congress. Audits would be conducted under security standards prescribed by the DNI in consultation with the requesting committee, and the results of audits requested by other committees would be submitted through the SSCI and HPSCI, but only in that very restricted sense is it true to say that the two intelligence committees would become the focal point for the audit process. As an added control, the DNI would be given a power to exempt particular funds or activities from audit, assuming determinations that such action was essential to the national security and subject to conditions requiring congressional notification.

Sections 131, 141, and 142 create NSC functions respecting the review and approval of special activities and certain sensitive clandestine collection activities, and respecting the function of counterintelligence, counterterrorism, and communications security policy. They would also regulate the manner in which the NSC would be required to carry out these functions. As already noted, the working group recommends these provisions be reduced to a simple statement of the relevant functions, and that the procedural requirements be left for consideration in conjunction with Title II.

Sections 151 and 152 deal with Executive branch and legislative oversight of intelligence activities. A subsection-by-subsection comparison of these two sections with the comparable provisions of E. O. 12036 is attached at Tab 3. In sum, Section 151(a) would establish the Intelligence Oversight Board as a statutory entity to be composed of three members subject to Senate confirmation. The Board would function under the detailed charter spelled out in this Section, which generally

parallels the IOB's charter under E.O. 12036. Other provisions in Section 151 would assign various oversight responsibilities to heads of intelligence community entities, general counsels and inspectors general within the community, and to the Attorney General. The latter's responsibilities for the most part would be above and beyond anything contemplated or required by E.O. 12036.

Section 152(a) is of central importance. It contains the basic provisions governing the obligations of heads of intelligence community agencies to keep the SSCI and HPSCI "fully and currently informed" regarding all intelligence activities of their respective entities, and to furnish to the two committees "any information or material" relating to those activities. The language of this provision differs in some respects with the relevant E.O. 12036 provisions, the primary difference being that the Executive Order includes, while Section 152 omits, a reference to "such procedures as the President may establish" as a qualification of the obligations to keep the intelligence committees "fully and currently informed" and to furnish "any information or material."

There are clear indications from the SSCI that at least the Committee is prepared to drop all other specific reporting requirements in Title I on the theory that Section 152 is all inclusive, making the more particularized provisions unnecessary. The view of the working group is that this approach is sensible and that with modest revisions Section 152(a) should be accepted.

Other provisions in Section 152 relate to required recordkeeping by heads of intelligence community entities.

Section 153 has to do with disclosure by the SSCI and HPSCI of classified intelligence information. It requires the two committees to adopt regulations under which such information would be made available to other committees or members of Congress, and it prohibits the public disclosure of such information except in accordance with the existing procedures set forth in the two authorizing resolutions, S. Res. 400 in the case of the SSCI and H. Res. 658 in the case of HPSCI.

Section 154, the final provision in Title I, requires the DNI to publish annually an unclassified report on activities conducted by entities of the intelligence community.

III. RECOMMENDED CHANGES AND ISSUES FOR SCC CONSIDERATION

There is agreement within the working group as to a number of changes in Title I that should be supported by the Administration and urged upon the Congress. Those changes as to which such working group agreement exists are reflected in the marked up copy of Title I attached at Tab 2.

The issues that in the view of the working group merit SCC consideration are identified and discussed below. They are not arranged chronologically by section but rather are grouped under general headings as follows: scope of the legislation (as to both entities and activities); status, role and authorities of the DNI; oversight and accountability; and nonoversight role of the Congress.

IV. DEFINITIONS AND SCOPE OF LEGISLATION

Title I authorizes defined entities to conduct defined activities. It also makes the defined entities and activities subject to the authorities of the DNI and to oversight jurisdiction of the SSCI and HPSCI and the IOB. The definitions of the intelligence community, and all the various forms of intelligence activity, are therefore matters of key importance since they control the meaning of many subsequent provisions in Title I.

Issue 1 - Entities of the "Intelligence Community" - Section 104(16)

Description. As introduced, S.2525 would include within the "intelligence community," defined in Section 104(16), the Office of the DNI, CIA, NSA, DIA, INR at the State Department, "any office within DOD conducting special reconnaissance activities," the "intelligence components" of the military services and of the FBI, Treasury, DEA and Energy, their successors, and any other components of departments and agencies determined by the President to be engaged in "intelligence activities." Except to the extent the language describing the DOD reconnaissance offices differs slightly, and except for the use of "components" instead of "elements," this conglomeration of entities is essentially the same as the definition of "intelligence community" in Executive Order 12036.

Nature of the Issue. Whether the definition of the intelligence community should be more or less specific.

Commentary: One view of this issue, although not the one favored by the working group, is that the definition of entities in the intelligence community should be even more specific. Under this view all

entities that are also agencies (CIA, NSA, etc.) would continue to be named, and the other entities would be referred to, for example, not just as "intelligence components" of the departments and agencies, but rather by the actual name of the office or organizational unit involved. This approach, particularly as applied to departments and agencies with both intelligence and non-intelligence functions, would serve the purpose of clearly informing the public which parts of the Government are engaged in activities covered by the bill, and it would eliminate any doubt within the Government on that score. On the other hand it would destroy all flexibility and lock into place the existing organizational arrangements, which presumably will be subject to change from time to time in the future just as they have been in the past.

Another approach is to accept the definition as written, on the theory that it conforms to the Executive Order and therefore affords us reasonable assurance that we could impress upon it in its more indefinite aspects, as for example in its reference to "the military components of the military services," the same meaning we ascribe to the same terms in the Executive Order. Our acceptance would also give Congress an assurance that no effort was being made to somehow cut down on the scope of the intelligence community and to remove some of its recognized parts from the reach of the legislation. It would also fix the composition of the community with reasonable certainty, leaving enough flexibility to adjust to new organizational arrangements but not enough to allow the removal of entities that should have, and that the Congress almost certainly intends to have, permanent community status.

A third approach, strongly preferred by DOD, is to urge a definition that specifies only those agencies or entities in the community that can be named in a public statute and that can be identified in a way that leaves no room for doubt as to exactly what was intended. Under this approach the entities specified by name would be the Office of the DNI, CIA, NSA, DIA, INR at the State Department, and the Intelligence Division of the FBI. For the rest, there would be a general provision authorizing the inclusion in the community of "such other components of the Departments of Defense, Treasury, and Energy, and other departments and agencies as the President may designate." This approach would promote maximum flexibility and at the same time avoid the use in a statute of such inexact terms as "intelligence components of the military services," which might later be subject to misunderstandings or differing interpretation. The President's designations could then be in more precise terms, eliminating the possibility of confusion.

Under either the second or third approaches, it is predictable that Congress will want to know just what the definition includes, or what specific designations would be made by the President. The working group believes that the Administration must be prepared to respond and, particularly if the third approach is adopted, to give firm assurances as to the designations intended by the President. Accordingly, putting aside the Drug Enforcement Administration for a moment, the working group believes that the SCC should endorse the composition of the intelligence community as it presently understood, and that the President should do likewise. Of special significance in this regard

is that the SCC reflect its understanding that the "intelligence components of the military services" include, among other things, the counter-intelligence components of the Army, Navy, and Air Force, by name the Army Intelligence and Security Command, the Internal Security Department of the Naval Investigative Service, and the Counterintelligence Directorate of the Office of Special Investigations; that the "intelligence components of the Department of the Treasury" is a reference to the Office of Intelligence Support and does not include the Secret Service or the Bureau of Customs; and that the "intelligence components of the Department of Energy" is a reference to the intelligence components of the Office of International Security Affairs.

As for DEA, notwithstanding the inclusion of its "intelligence elements" in the Executive Order definition of the intelligence community, the working group would not recommend its designation by the President. The working group considers it doubtful that there are any intelligence elements in DEA, although it realizes that a more detailed study of that question is now in progress. Should that study produce a different conclusion, the working group is prepared to reconsider its decision not to recommend DEA for designation as a part of the intelligence community for purposes of S.2525.

Issue 2 - "Intelligence Activity" - Section 104(15)

Description. This issue, not entirely unrelated to the issue regarding which entities should be included in the "intelligence community," relates to the proper scope of the activities which should be included within the coverage of S.2525. The definitions in Section 104 include "foreign intelligence" and "foreign intelligence activity," "counterintelligence" and "counterintelligence activity", "counterterrorism intelligence" and "counterterrorism activity," and incorporate these various forms of activity, along with "special activity," within the meaning of "intelligence activity." Section 111, as revised by the working group, would authorize entities of the intelligence community to conduct "intelligence activities" in accordance with the provisions of the bill. These definitions, as written and used in the unrevised bill, would be sufficiently broad as to have the potential to draw under the coverage of the bill the law enforcement or other non-intelligence functions of entities such as the FBI, the military services, the Customs Service and the Secret Service. In addition, these definitions, as written, would seem to include other activities such as the security programs of the military and other entities, the communications security functions of NSA, and the overt reporting from abroad of the State, Treasury, Commerce and Agriculture Departments and others.

Nature of the Issue. The issue here is how to modify the legislation so as to include activities properly subject to the authorities and limitations of the bill and at the same time to exclude activities not properly so subject, whether or not performed by entities within the "intelligence community."

Commentary and Analysis. The concern regarding the bill's potential coverage of lawenforcement and nonintelligence activities of entities both within and outside the "community," was remedied by the addition of a new Section 111(c). Approved by the working group, this addition provides that nothing in the bill will prohibit or affect such activities by any department or agency.

There was also concern regarding the inclusion of the various personnel, physical, document and communications security programs and such activities as overt reporting from abroad by the Foreign Service, Treasury, Commerce, FAA, Agriculture and others, particularly with regard to the potential this raises for their subjugation to the review and budget authorities of the DNI.

The DNI budget authority is not a real problem because of the manner in which the "national intelligence budget" is defined in Section 104(24), as revised. Given the fact that these security programs and overt reporting activities do not fall within the Consolidated Cryptologic Program or the General Defense Intelligence Program, they will not be included in the national budget and thus be subject to the DNI budgetary authorities unless the DNI and the head of the relevant department or agency agree to their inclusion.

As for the other DNI review authorities, the problem centers, as to the security programs, on the definition of "counterintelligence activity" in Section 104(6)(B) which, as written in the unrevised bill, includes "any activity undertaken to counter the espionage...activities of a

foreign government." This would appear to encompass all security programs, as well as traditional counterintelligence operations, and, when read in conjunction with Section 114(b)(2) authorizing the DNI to coordinate such activities abroad, might even be construed to displace the Secretary of Defense from the principal role in the U.S. communications security program. The danger in excluding these security programs entirely from the coverage of the bill is that activities may be allowed to proceed under the rubric of "security programs" and thus evade the limitations otherwise applicable to them if properly identified as "intelligence activities." For the purposes of Title I, however, and based on the twin premises that these programs will be subjected to appropriate restrictions in Title II and that these programs are currently excluded in toto from the review and coordination functions of the DCI, this problem was resolved simply by revising Section 104(6)(B) to read "any activity, except for personnel, document, physical, and communications security programs undertaken to counter...."

The difficulty regarding overt reporting from abroad by various departments centers on Sections 104(13), (14) and (22) which define "foreign intelligence" and "foreign intelligence activity" broadly enough to include such reporting, and then includes this broad concept of "foreign intelligence activity" as the major element in the definition of "national intelligence activity." The subsequent authorization of the DNI in Sections 114(b)(1) and (c) to coordinate and review all "national intelligence activities" of the U.S. might be construed so as to include these overt reporting programs. One suggested means of resolving this ambiguity was to limit the definition of "foreign intelligence" to

the type of information described but only when collected by entities of the intelligence community. However, because this would result in the circularity of authorizing entities to do certain things and then defining those things as what those entities do, and since "foreign intelligence" is used throughout the bill so that such a change may have serious unforseen consequences, this change does not seem advisable. The alternative is to substitute "entities of the intelligence community" for the words "United States" in both Sections 114(b)(1) and (c). This change excludes these overt collection activities from the DNI review authorities and is based on the premise that the DCI does not, and the DNI should not, have any review or coordination functions as to those programs.

Issue 3 "Intelligence Sources and Methods" - Sections 104(17) and (19)

Description. The bill, as written, would define intelligence sources and methods in a limited manner which would require a showing that the disclosure of a source or method would make it "vulnerable to counteraction which could nullify or significantly reduce its effectiveness" in providing intelligence or supporting intelligence activities. Section 114(1), as revised, would continue in the DNI the existing responsibility of the DCI to protect intelligence sources and methods from unauthorized disclosure. The effect of the bill's definitions would be to limit this protective authority to present, as opposed to past or future, sources or methods information, and to establish a new standard of proof which would be applicable to all exercises of this protective authority.

Nature of the Issue. CIA desires much broader definitions of intelligence sources and intelligence methods not limited to present

sources or methods and not subject to a "risk of harm" factor, so as to retain intact the existing protection for such information.

Commentary and Analysis. The Department of Justice has a twofold concern regarding these broadened definitions, included in the revised version of Title I at Tab C. The first area of concern is that these broad definitions, coupled with the DNI protective authority, may be subject to misconstruction and overextension. The authority could be invoked, conceivably, to protect even an issue of the New York Times and might be abused by an interpretation that the responsibility authorizes surreptitious entries and various forms of surveillance as part of "leak" investigations. The second concern is related to the current efforts of the Justice Department to draft a proposed statute to provide criminal sanctions for unauthorized disclosure of intelligence sources and methods. In order to have any prospect of acceptability, such a statute must be narrowly drawn and cannot be based upon such broad definitions of sources and methods with no "harm" factor included as a element of the offense to be punished. The definitions in this bill and the proposed criminal statute should be consistent.

In view of the CIA, however, the nature and extent of the protective authority provided in this bill will strike to the very heart of the intelligence function and there should be no alteration, real or potential, in the current authority. Concerns as to possible abuses and misinterpretation of this authority may be avoided by explanatory language in the legislative history and the various reports which will accompany this bill through the legislative course. Further, there is no reason the definitions in this bill relating to all-purpose protection of sources or methods must be the same as those in a statute imposing

criminal statutes previously requiring higher thresholds to be workable.

The definitions in this bill must be as broad as possible to account for the past, present and future development and use of sources and methods, all of which require protection to maintain an effective intelligence system. Further, any limiting amendment to the current authority would be viewed by sources as a further lessening of this government's ability to provide them continued protection and would result in rendering irrelevant the invaluable body of law and precedent which has been built up, particularly as regards the authority to withhold information under the Freedom of Information Act, around the current authority. See, e.g., Halperin v. CIA, C.A. No. 76-1082 (D.C.D.C. March 7, 1978); Baker v. CIA, 425 F. Supp. 633, 636 (D.C.D.C. 1977); Bachrack v. CIA, CV No. 75-3727 - W.P.G. (D. Calif. May 13, 1976). Without this clear authority to protect information, CIA would be forced to rely upon the vagaries of the classification system. Such reliance, or the inclusion in these definitions of a risk factor, will require the Agency to meet the standards of proof erected and to risk a denial of protection by a judge who disagrees with the assessment of likely damage from a disclosure. A retreat in any degree from the current authority to withhold information so vital to the national interest would be particularly anomalous in light of existing federal laws which endorse protection of peanut and other crop statistics, insecticide formulas, census information, proprietary information and trade secrets, various forms of credit and bank data, and many other forms of information, obviously because of a recognition of the fact that lack of protection would lessen the willingness to provide such information.

V. STATUS, ROLE AND AUTHORITIES OF THE DIRECTOR OF NATIONAL INTELLIGENCE

This issue actually consists of several sub-issues, each related to the basic policy question of what should be the proper form and nature of the position of "Director of National Intelligence" (DNI) embodied in Title I of S.2525. The character of this position, and consequently the effectiveness of its incumbent, will largely be determined by decisions regarding its organizational setting, the official status to be accorded the position, the conditions imposed upon the term of office associated with the position, and the extent and nature of the authorities which accrue to the position.

If enacted as now written, S.2525 would create a DNI with responsibilities and authorities including those now possessed by the Director of Central Intelligence under Executive Order 12036 but also with additional authorities which would go beyond that order. In summary, the DNI would be a Cabinet-level official. There would be created to assist the DNI an Office of the DNI which would include the DDNI and up to five ADNIs, all of whom would be Senate-confirmed Presidential appointees, and a DNI staff. The DNI would also be head of CIA, although, as explained below, this function may be removed by the President and reposed in the DDNI or an ADNI. The bill would also empower the DNI to recommend to the President annually which intelligence activities should be designated as "national" in nature and thus be subject to the DNI's enhanced authorities. (§112). The authorities now provided in E.O. 12036 would be supplemented by broad supervisory authority to provide guidance to heads of intelligence entities in furtherance of the generalized DNI functions of providing necessary information and analyses to both

the executive and legislative branches and ensuring national intelligence activities are conducted in compliance with the Constitution and law (§114(c)). The DNI also would exercise authority under S.2525 to evaluate, and take action necessary to improve, the quality of national intelligence. (§114(h)). Services of common concern would be assigned to various entities by the DNI (§114(k)), and on the face of the bill the DNI would have authority to separate persons employed by any entity of the intelligence community. (§114(m)). Finally, the bill would add the requirement that all entities of the community furnish the DNI with all internal analyses of national intelligence information (§114(r)), and with the various inspector general, general counsel, entity head, IOB, and Attorney General reports required by the bill concerning the legality or propriety of each entity's intelligence activities. (§§151(d), (e), (f), (g)).

As is described below, the charter legislation working group has attempted to recast this statutory DNI to more closely resemble the model established in Executive Order 12036. Nonetheless, because the statutory version must of necessity depart from that model in some respects, and because charter revision allows attention to matters which could not be addressed in an Executive Order, such as grade and term of office, certain issues remain and appear sufficiently significant to require the attention of the SCC.

Issue 1 - Organizational Setting - Section 117 - DNI as Head of CIA

Description. Section 117 authorizes the President to transfer from the DNI to the Deputy DNI (DDNI) or to one of five Assistant DNIs (ADNI) "any or all of the duties and authorities" of the DNI as head of the Central Intelligence Agency. Such a transfer would be conditioned only upon the recipient being a civilian, on notice to Congress at least 60

days prior to the effective date of the transfer, and on the failure of Congress to move its disapproval of the transfer. This action would leave the DNI with an independent staff organization created by the bill and called "The Office of the Director of National Intelligence" within which would remain the DNI, the remaining DDNI and ADNIs, and such staff elements as are required to perform the responsibilities of the DNI. Title IV of S.2525 provides that any DDNI or ADNI to whom are transferred the responsibilities of head of CIA will remain subject to the supervision of the DNI and responsive to intelligence plans, objectives and requirements established by the DNI. (Section 412(a)). These provisions bring into focus the issue of whether the DNI should remain head of CIA.

Commentary. It appears this provision is included in the bill as a result of an unresolved divergence of views within the Senate intelligence committee as to whether the DNI should be separated from CIA. Even as a compromise position, however, this approach is not satisfactory. The argument in favor of separating the DNI from CIA is essentially that such an act will somehow free the DNI from the suspicions and allegations of bias on behalf of CIA which have arisen in some quarters and may to some extent have interfered with the effective and complete performance of the central, coordinating role originally intended for the Director of Central Intelligence. Arrayed against that position are serious questions as to the effectiveness of such a disembodied official, isolated and devoid of any direct organizational base of support for authorized functions, as well as the danger of policitizing the position because of its resulting increased dependence upon the favor of the President and the White House staff. The proposed legislation perpetuates these questions without resolving the perception problem. It would result in prolonged uncertainty on the part of the DNI and CIA regarding the

continuity of their relationship. Even were the transfer authority actually to be implemented by a President at some future date, under Title IV the new head of CIA would have no truly independent status but would remain subject to the supervision of the DNI. Furthermore, unless such a transfer is also intended to be a device for the dismemberment of CIA - as, for instance, a means to clarify the bill's confused lines of production responsibility by removing CIA's production capability and vesting it in the Office of the DNI - the remaining DDNI and ADNIs, potentially five high-level officials, would exist in the Office of the DNI with virtually no organizational or functional basis. Otherwise, since there would be no other entity upon which to rely and since Title IV authorizes various forms of CIA support to the DNI, the DNI and the Office of the DNI would remain heavily dependent upon CIA for intelligence and administrative support services. The transfer of authorities would thus serve no real purpose and would have the effect of weakening the positions of both the DNI and the head of CIA rather than strengthening either.

The President has the authority, under the Reorganization Act (5 U.S.C. 901 et seq.), as reenacted from time to time, to separate the DNI from CIA or to transfer various functions as necessary. Thus, unless Congress should allow the Reorganization Act to lapse and refuse to reenact it, Section 117 serves no real purpose in this bill except to avoid certain of the procedural and reporting requirements of that Act. As the working group sees it, this slight benefit is not worth the resulting cost in terms of the potential for uncertainty and confusion which it may generate. Finally, the rather smooth functioning of the

existing arrangement established under Executive Order 12036, with the DCI fulfilling dual responsibilities as head of CIA and principal intelligence officer for the U.S. Government, calls into question the basic need for any separation of the DNI from CIA.

Issue 2 - Status - Section 113 - DNI Level and Support Staff

Description. The cumulative effects of Sections 113, 116 and 702 would be to create a DNI at Level I of the Executive Pay Schedule (EPS), supported by staff elements of the Office of the DNI, a Deputy DNI at Level II, up to five Assistant DNIs at Level III, and the resources and personnel of CIA. The DNI, DDNI and ADNIs would be Presidential appointees and would require Senate confirmation. These provisions raise the issue of the official standing to be accorded the DNI.

Commentary. Including the DNI among the officials at Level I of the EPS will place that position at a level held now by members of the President's "Cabinet" and the Special Representative for Trade Negotiation. The DDNI would be raised to the level of the Deputy Secretaries of the various departments, and any ADNIs who are appointed would be placed at the Assistant Secretary level. In effect, the DNI would be accorded Cabinet-level status and be supported by a group of senior officials in a framework roughly equivalent to the organization of the Cabinet departments.

It is apparent that the "rank" of the DNI must be based upon a thorough consideration of the extent and importance of the authorities and responsibilities vested in that office. Further, it can be generally agreed that a DNI with the far-reaching powers embodied in that office by S.2525 would surely merit Cabinet-level treatment. What is not so readily apparent is whether that status should be accorded to a DNI with

authorities more closely paralleling those in Executive Order 12036. The argument against that status is essentially that fewer policy and management responsibilities are vested in the DNI than are vested in existing Cabinet-level positions. Neither Executive Order 12036 nor its predecessor E.O. 11905 did or could, of course, effect such an increase in the level of the DCI despite the sizeable elaboration and enhancement of the responsibilities of that office which those orders accomplished. The DCI even now performs substantial and unique functions as the principal intelligence officer of the government, as the central figure in the management and coordination of activities and programs involving multiple departments and agencies and of vital national concern, and, as is not the case with the Special Trade Repreentative, as head of a sizeable agency with significant responsibilities relating to the national security and foreign policy interests of the U.S. The DCI now chairs the Policy Review Committee which is made up of Cabinet-level officers, has frequent official interaction on an equal basis with officers at that level, and deals directly, as do those officers, with the Congress and the President. With these responsibilities supplemented by incidentally necessary authorities, formalized and cast in statute, there is much to be said for establishing a DNI at Level I to remove any hint of an impediment to their full performance. (This argument assumes, of course, that the DNI will not be separated from CIA since there would be difficulty justifying this increase if such a separation were to be advocated.)

The status of the DDNI and ADNIs would follow upon the increased role of the DNI. It is felt by some that authorizing five ADNIs requiring Senate confirmation would be overly bureaucratic and threaten politicizing the U.S. intelligence structure. In the former regard, it

should be noted that the bill authorizes "not more than" five ADNIs and the President need appoint, and the Senate confirm, only that number which the DNI is able to justify. As to the Senate confirmation issue, to the extent the Senate is aiming for accountability and control through this mechanism, it may be possible to convince the Congress that it may rely upon other means, such as hearings, briefings and other formal or informal contacts with these officials to achieve that goal. On the other hand, appointment and confirmation may make for increased independence on the part of these officials, and, to the extent the bill requires confirmation of the DNI, DDNI, and other officials in the intelligence structure, such as the general counsels of CIA and NSA, policitization of the ADNI positions is a minor concern.

Issue 3 - Term of Office - Section 113(b) - Conditions on Length of DNI and DDNI Service

Description. The bill would establish a fixed six year term for the DNI and the DDNI, with a second term of six years allowed to each upon reappointment and reconfirmation. Each official would serve at the pleasure of the President during these terms. No person would be allowed to serve in either or both offices for a total of more than 12 years. The extent and nature of conditions which should be imposed upon the terms of these officials is the issue raised by these provisions.

Commentary. The requirement of a fixed six year term, followed by reconfirmation and another six year term, is unprecedented and unwise for both the DNI and DDNI. In addition to the uncertainties and lack of continuity which such limited terms would present, there is the risk the reappointment hearings will develop into a vehicle for harassment and inquiry into all events of the first six years. It would be preferable

to have a fixed ten year term for the DNI comparable to that of the Director of the FBI, but also subject to the pleasure of the President. This would provide continuity and accountability, but would also make allowance for the special personal relationship which must exist between the President and the principal intelligence officer of the government. Also, a capable DDNI should not be penalized for experience gained in that capacity and should be allowed the opportunity to serve a full term as DNI rather than being limited to total service not exceeding a full term as DNI.

Issue 4 - DNI Role - Section 114 - Authorities of the DNI

Description. As stated earlier, S.2525 would provide the DNI with authorities exceeding those furnished the DCI in Executive Order 12036. The working group has revised or replaced various existing statements of the DNI's authority in Sections 112, 114, 115, 121 and 151 of the bill to conform roughly to the executive order model and to eliminate authorities which appeared to conflict with or exceed that model. As a result there is general agreement that the DNI will retain the following authorities and responsibilities:

- serve as the principal U.S. intelligence officer (§114(a));

- coordinate national intelligence activities, counter intelligence activities abroad, and counterterrorism activities of the intelligence community abroad (§114(b));

- review all ongoing and proposed national intelligence activities to ensure efficient, effective direction and administration (§114(c));

- act as the head of CIA and the Office of the DNI, and be supported by the DDNI and ADNIs (§113, 114(d), 116(a));

- coordinate and direct national intelligence collection activities by establishing procedures to increase the national intelligence contribution of nonintelligence community entities, and coordinating all clandestine collection activities abroad (§114(e)(2), (3)):

- be responsible for production and dissemination of national intelligence and levy analytic tasks on departmental intelligence production organizations (§114(f));

- be responsible for dissemination of national intelligence and establish procedures to ensure intelligence community and other deaprtments, agencies and military commanders receive relevant national intelligence (§114(g)(1), (3);

- ensure appropriate implementation of covert action and sensitive clandestine collection activities (114(i));

- formulate policies regarding intelligence arrangements with foreign governments and coordinate intelligence relationships between U.S. and foreign intelligence entities (§114(j)(1), (2));

- promote the development and maintenance of services of common concern by intelligence community entities (§114(k));

- protect intelligence sources and methods and establish minimum security standards for related information and materials (114(l));

- protect the organization, functions, etc., of persons employed by the Office of the DNI (§114(New));

- appoint, promote, separate, and terminate in the interests of national security, employees of, and security clearances of contractors to, the Office of the DNI (§114(m), (n));

- receive, or designate the appropriate recipient of, all national intelligence obtained by any department or agency (§115);

- establish advisory committees as necessary and waive, when necessary, the reporting requirements of the Federal Advisory Committee Act (§116(b));

- account by voucher for the expenditure of funds appropriated to the Office of the DNI for national intelligence, counterintelligence, and counterterrorism activities (§122(b));

- establish security standards for the conduct of GAO audits or reviews of national intelligence, counterintelligence, or counterterrorism activities requested by or through the congressional intelligence committees (§123(c)); and,

- exempt funds from such audits when essential for security reasons (§123(e)).

These responsibilities are essentially identical to, or consistent with, existing authorities of the DCI under Executive Order 12036, and other sources of authority such as National Security Council Intelligence Directives. There remain, however, several issues concerning whether additional statements of DNI authority are new and additional to existing authorities, or are merely attendant, necessary, and incidental to the effective performance of existing authorities.

Commentary.

a. Section 114(e)(1) of the bill provides that the DNI, in order to coordinate national intelligence collection, may develop "plans, objectives and requirements" for the intelligence community

as necessary to meet "needs and priorities" established by the National Security Council.

Nature of the Issue. The issue arises over whether this provision grants the DNI greater authority than now is the case because of its departure from the language of the executive order which authorizes the DCI to translate "requirements and priorities" developed by the NSC into "objectives and targets".

Analysis. This may be a mere semantic dispute, since in either case it is the NSC which establishes the "requirements," "needs," or "priorities" which the DCI or DNI must draw upon to develop and assign specific collection "requirements," "objectives" and "targets" for both present and expected intelligence needs. It is feared that "requirements" may carry with it a directory-tone which will allow the DNI to exert too much control over collection resources. On the other hand, however, "requirements" is used in the inteligence sense just as often to mean a set of goals or aims to be achieved. Further, the phrase "plans, objectives and requirements" may more closely describe the actual function performed by the DNI in guiding, not directing, the collection process, than does "objectives and targets" which connotes a more specific operational involvement than would in fact be the case.

b. Section 114(f)(3) authorizes the DNI to obtain analytic assistance from other intelligence community entities. See Tab A (Statement of Issues Requiring SCC Decision), Seventh Issue, for a discussion of the unresolved conflict relating to this provision.

c. Section 114(g)(2) authorizes the DNI to "establish procedures to increase the usefulness" of national intelligence information to departments and agencies.

Nature of the Issue. The issue here is whether this authority will allow the DNI to exert control over collection activities.

Analysis. This authority, it is believed, may be used by a DNI to wrest control of collection resources from department and agency heads and should be reduced merely to establishing the "format" in which this information is presented. On the other side of the argument, however, such procedures will extend beyond mere type-face and other "packaging" elements, to the manner and rapidity of publication and dissemination, designation of appropriate recipients, desired levels of classification, and other factors attention to which may be encessary to assure that consumers receive information which is useful to them. The authority is not new but is a necessary part of the DNI's overall responsibility for the production of national intelligence.

d. Section 114(j) would require DNI to consult with the Secretary of State in formulating policy regarding intelligence arrangements with foreign liaison services and in coordinating all such arrangements.

Nature of Issue. These provisions raise the issue of the appropriate role of the Secretary of State in regard to intelligence agreements with foreign liaison services.

Analysis. The presumed purpose of the consultation requirement is to assure the Secretary is kept informed and given the opportunity to influence policy regarding these relationships. By the same token, while it may be conceded the Secretary should be consulted in the formulation of policy in this area, it will needlessly hinder the day-to-day activities of the DNI, officials actually performing this DNI function, and intelligence officers in the field if they were required to regularly consult with the State Department.

As an accommodation of the respective interests of the DNI and the Secretary of State, the working group believes that the consultation requirement should extend to the formulation of policy respecting intelligence arrangements and relationships but not to the coordination of these relationships or to the actual conduct of liaison with foreign intelligence services. The working group mark-up of Title I reflects this accommodation.

e. Section 114(n) would grant the DNI authority to terminate, as necessary or advisable in the interests of national security, not only the security clearance of contractors of the Office of the DNI, but also contractors of any other entity of the community.

Nature of the Issue. The issue as to this provision is not so much whether it exceeds authority now exercised by the DCI, but whether such authority may potentially interfere with the conduct of departmental activities.

Analysis. Opposition to this authority centers on the concern that its exercise by the DNI might preclude the use of effected contractors on nonintelligence projects which also require security clearances. While this concern may be sufficient grounds to limit this DNI authority to contractor clearances relating to intelligence activities, the basic authority to terminate these clearances may be justified as a necessary adjunct to the responsibilities of the DNI to establish and maintain security standards and to protect intelligence sources and methods.

f. Section 114(q) would allow DNI review of intelligence and intelligence-related activities of the government as appropriate to carry out the duties assigned to the DNI.

Nature of the Issue. The issue as to this provision centers on whether this exceeds the authorities provided in E.O. 12036 and would empower the DNI to inquire into matters not properly within the DNI's area of concern or whether this is merely an ancillary authority essential to the effective performance of the DNI's overall responsibilities for national intelligence.

Analysis. The definition of "intelligence-related activity" in Section 104(18), as revised, would include any activity that is capable of providing national intelligence or of supporting national intelligence activities (defined to include special and foreign intelligence activities), any activity that is devoted to the support of, or conducted for the purpose of training persons to participate in, any intelligence activity (defined to include special, foreign intelligence, counterintelligence and counterterrorism activities), and any activity involving research and development of intelligence capabilities. The term would not include activities closely integrated with weapons systems. (The Defense Department, as has been stated previously, would like this definition and the references to this term deleted regardless of the outcome of this issue.)

Section 114(q) would authorize the DNI, in order to carry out the duties of that office, to review all intelligence and "intelligence-related" activities of the government and all research and development in support of those activities.

The argument against this authority is not based upon the premise that the DNI should be strictly limited to "national" intelligence activities and should have no authority whatsoever to determine whether various departmental activities should be more appropriately categorized as national intelligence activities, or whether departmental and national activities are duplicative. This type of review is in fact done now. However, the authority in Section 114(q) is too broad for this purpose, especially since under Section 112(a), as revised, the President will have the authority to designate additional national intelligence activities from among the foreign intelligence activities of the government, Section 114(e)(2) will enable the DNI to establish procedures, in coordination

with the entity head, to increase the national intelligence contribution of entities outside the intelligence community, Section 114(p) will allow the DNI to obtain information from any entity when necessary to perform the DNI's duties, and Section 115 will require all entities to furnish all national intelligence to the DNI. These sections will provide the DNI with sufficient authority to inquire into a broad range of activities and, together with a flexible revised definition of the "intelligence community," will allow the identification and designation of additional activities as national intelligence activities when appropriate.

The counterargument is that the DNI is given broad authorities and responsibilities as to all national intelligence activities. Even as revised, Section 114(b) charges the DNI with broad and varied coordination responsibilities, 114(c) requires the DNI to review continuously all existing and proposed national activities to ensure their proper and efficient regulation and administration, and 114(e) imposes general responsibility on the DNI for collection of national intelligence while 114(f) and (g) do the same as to its production and dissemination. These responsibilities cannot be performed fully and effectively without authority to inquire into the existence and nature of activities which may be parallel, duplicative, or necessary and more appropriate to national versus departmental activities. The authorities provided in other portions of Title I are all limited in one way or another to "foreign" or "national" intelligence. Section 114(p), while seemingly a broad authority, is limited to inquiries necessary to perform the DNI's "duties." Those duties are essentially restricted to "national" intelligence and it may be argued this provision furnishes no authority to inquire into departmental programs. Section 114(p) may be

sufficient and allow the deletion of Section 114(q) if modified to allow the DNI to obtain information pertaining to "intelligence activities" as well as information necessary to the performance of the DNI's duties.

g. Section 121 essentially parallels the language of Executive Order 12036 regarding the budgetary authority of the DCI and provides virtually identical authorities to the DNI.

Nature of the Issue. There is disagreement concerning whether the specific implementing authorities stated in subsections (a)(1) through (4) are necessary.

Analysis. (1) While it is believed by some that such details are undesirable in this statute, the same considerations of certainty and permanency which compelled their inclusion in the executive order also argue for their inclusion here. If these authorities are retained, the additional executive order authority to oversee reprogramming decisions should be inserted into this chain of authorities in order to control subsequent reshaping of budget decisions. (2) The final issue raised by these provisions concerns Section 121(c) which requires that departmental budget decisions not be allowed to offset national budget determinations. There is no precise counterpart to this provision in the executive order and it is argued this provision is unnecessary and should be deleted. On the other hand, there are provisions in the order exhorting particular officials to the same end, and such a safeguard is a desirable and necessary adjunct to the national intelligence budget authorities, again to control subsequent reshaping of that budget.

VI. OVERSIGHT AND ACCOUNTABILITY

A. EXECUTIVE BRANCH. The largest issues on this score surround the provision in Section 151 which sets up the IOB as a statutory entity composed of three members subject to Senate confirmation. The most basic of these issues concerns whether the IOB should be mentioned at all in the bill. Assuming the Administration favors statutory recognition of the Board, another issue of comparable importance is whether the legislation should include a detailed charter of the type created by Section 151 or whether on the other hand it would be preferable if the President were simply to be given a broad general statutory mandate to establish such a Board, with the particulars as to membership, authorities, etc., left to the President's discretion. Finally there are issues as to what the particulars should be if the legislation is to include a detailed charter.

Issue 1. Should the IOB Become a Statutory Entity

Commentary. The enactment of a statute directing that it be established would of course put the IOB on a permanent footing and foreclose possible decisions by future Presidents who might be inclined toward less rather than more oversight of intelligence activities and who might otherwise move to modify or dismember the Board. At the same time it is probably true that the effectiveness of the Board will always depend on the support of the President that it serves, and therefore a question exists as to whether there is anything to be gained by converting from the Executive Order arrangements to a Board with a statutory foundation.

The IOB believes strongly that provision for its existence should be included in any charter legislation. It argues that it has become an integral and necessary part of the intelligence machinery, that its authority would be enhanced by statutory recognition, and that an Administration position urging deletion of the IOB provisions in Title I would be seen as a retreat from the commitment to effective oversight. The argument on the other side of the issue is that the role of the IOB is still experimental to a degree, and that there is a lesser imperative for the Board today than was the case at the time of its formation in February 1976, prior to the establishment of either the SSCI or HPSCI, that over the long term there may be no greater justification for a special Executive Branch entity charged with oversight of intelligence activities than there is with respect to many other governmental activities having a potential for abuse, and in any event that the President's freedom to make or alter these arrangements as he sees fit should be preserved, unencumbered by a need to seek an amendment of a statute.

Issue 2. Should the Members of the Board be Subject to Senate Confirmation

Commentary. The IOB's negative views on this issue are stated on page 1 of the IOB comments on S.2525, attached at Tab 4. Those views are as follows:

> The provision for advice and consent to the Senate should be deleted. The members of the IOB should remain confidential advisers to the President performing an independent oversight role for him. They are not officers running intelligence agencies or in charge of operational programs. Making IOB members subject to

> confirmation would pose the same threat to their ability to provide confidential evaluation and advice to the President as would a requirement for Senate confirmation for any other part of the President's White House Office staff.

This argument appears to be somewhat two edged, because the point that the Board is solely accountable to the President, and the analogy to White House Staff, weakens the case for statutory recognition.

Issue 3. Should the Legislation Include a Detailed Charter Commentary. Because the IOB charter provisions in Section 151 are based on the E.O. 12036 model, the question here is whether it is advisable to make a statutory fixture out of that model. Although the same point could be made with respect to other Title I provisions that are or in the view of the working group should be patterned after E.O. 12036, there is at least some reason to doubt that the body of experience acquired in the last two years is sufficient to justify confident judgments that the present oversight scheme is the best one that could be devised. Yet that scheme would be frozen by the enactment of Section 151. To be offset against this potential disadvantage are the gains, somewhat speculative at best, to be derived from legislating the oversight arrangements as opposed to letting them remain a creature of Executive Order.

Issue 4. What Details are Appropriate in a Statutory Charter Commentary. The following subissues are presented by the existing contents of Section 151:

a. IOB Reporting to the Attorney General and the DNI. Sections 151(d)(2), would require the IOB to furnish copies of its reports to the President and, as appropriate, to the Attorney General and the DNI, concerning activities which the Board believes

raise serious questions of legality. Also, under Section 151(d)(3) the DNI would be the recipient, as appropriate, of IOB reports as to serious questions of propriety. The IOB opposes these provisions insofar as they might be construed to require it to report its conclusions and evaluations to officials other than the President, and its position is stated in the relevant portion of Tab D. In addition, several members of the working group are of the opinion that the DNI, as head of an entity of the intelligence community, should not be privy to the reports to the IOB of the other entities. On the other hand, if the DNI is responsible, as is the case under Section 114(c), for the proper, efficient, and effective direction of national intelligence activities it will be important that the DNI be fully advised of these matters and any questions which may arise concerning ongoing activities or procedures.

So far as concerns the IOB's objections to Sections 151(d)(2) and (3), the working group believes the objections are not well founded. The idea of these provisions is not to force the IOB to give up its evaluations and conclusions to the Attorney General and the DNI but only to make known to these officials the existence of activities of which they have a need to be aware in the performance of their own functions. Given that meaning the provisions closely resemble other stated responsibilities of the Board, are not inconsistent with the counterpart provisions in E.O. 12036, and do not threaten the confidentiality of the relationship between the Board and the President.

b. Questions of "Propriety" and Other Aspects of the Reporting Standards. Section 151(e)(1) essentially reiterates the E.O. 12036 responsibilities of the inspectors general and general counsels to report to the IOB any intelligence activity which raises "any question of legality or propriety." The IOB, although commenting in the context of the frequency of reporting rather than the standards to be applied, "strongly recommend[s] retaining this provision in its present form [as it] reflects the current practice of the inspector general and general counsel within each agency." (TAB 4.) However, the working group favors substitute language, and conforming changes elsewhere in the bill, that would require a matter to be reported only if it is believed to involve "a serious question as to whether there has been a violation of law." The proposal recommended by the working group would modify the standards for reporting to the IOB that are currently applicable under E.O. 12036, and that would likewise be applicable if Section 151(e)(1) were adopted in its present form, in two ways.

First, the requirement to report questions of propriety would be eliminated altogether. The quarrel with that requirement is that the term "propriety" is utterly indefinite, especially in the context of intelligence activities, having so many different possible meanings as to have no real meaning at all. To make this term the centerpiece of a statutory obligation strikes the working group as unfair to the officials on whom the obligation would be placed, opening them to second-guessing no matter which way they might make the necessarily subjective judgments about the propriety of lawful

intelligence activities. The working group would also be worried about the potential liability of these officials in connection with this obligation were the concept of propriety not so vague as to make the obligation virtually unenforceable. Further, a central thrust of S.2525 is to mark the bounds of legitimate intelligence activity, with the result that if the legislation is enacted there will be a rather comprehensive set of legal standards and therefore many fewer instances in which there is no standard to apply except a non-legal standard in determining the appropriateness of particular intelligence activities.

The Board on the other hand cites E.O. 12036 as conclusive evidence of the President's endorsement of propriety as a reporting standard. It argues also that notwithstanding the growing network of legal standards there are many gray areas between those standards and many situations in which intelligence activities may be questionable even if lawful. For these reasons it believes that the propriety standard should not be dropped.

Second, the working group would raise the reporting threshold as to questions of legality. The requirement stated in Section 151(e)(1), which picks up nearly identical language in E.O. 12036, is to report any intelligence activity that raises "any question of legality or propriety." The working group sees two problems with this standard. One is that the reference to "any question" makes the standard unmanageable, there being such a large number and variety of legal matters with which the intelligence entities must

and do deal. Therefore in practice a more narrow and realistic standard must be applied, and in that sense the requirement must be flouted if it is to be met at all. The working group would cope with this problem by adding the word "serious" to the standard, as a description of the legal questions that must be reported. This change would be faithful to the intent of the requirement and make possible more honest compliance.

The other problem has to do with the word "legality." For example, the withholding of a document requested under the FOIA can raise serious legal questions (whether the facts justify the claim of exemption, etc.) that the working group does not view as within the intended oversight jurisdiction of the IOB. To more accurately define that jurisdiction, and to make it clear that possible illegality is the touchstone, the working group would confine the reporting requirement to questions that are both serious and related to activities involving possible violations of law.

c. Instructions Not to Report to the IOB. Section 151(e)(5) would restate and elaborate upon the requirement of E.O. 12036 that inspectors general and general counsels report to the IOB any occasion on which they are directed by the heads of their entities not to report a matter to the IOB. The bill also adds a counterpart responsibility on the part of entity heads, in Section 151(g)(5), to explain any such direction in writing to the IOB. The bill also requires both types of reports to be furnished to the Attorney General, the DNI, and the HPSCI and SSCI. As is indicated in Tab 4, the IOB is in favor of the

continuation of this type of requirement in statutory form. The working group, however, is opposed to these statements as demeaning to the inspectors general and general counsels and the heads of entities of the intelligence community. Further, such instructions would themselves raise questions of legality if there is to be a statutory obligation to report to the IOB and the inspectors general and general counsels need no such reminder to perform their obligations conscientiously.

Issue 5. Whether the Whistle Blowing and Whistleblower Provisions Should be Modified

Commentary. Section 151 contains a number of oversight provisions other than those relating to the IOB. One such additional provision, subsection (j), requires officers and employees of intelligence entities to report to their respective general counsels, inspectors general or entity heads any information on past, present or proposed intelligence activities that appear to be in violation of the Constitution or laws of the United States, Executive orders, Presidental directives or memoranda, or agency rules, regulations or policies. It is further provided along the same line that these procedures are not intended to be exclusive or to preclude direct employee reporting of such information to the DNI, Attorney General, IOB or the two intelligence committees. To fortify these provisions, the Attorney General is required by subsection (j)(3)(B) to "take all steps necessary" to ensure that employees who report such information in good faith are not subjected on that account to discipline, dismissal, or any other adverse personnel action.

The working group favors the deletion of subsection (j). In the first place, the basic reporting requirement strikes the working group as overly broad, covering as it does information on possible violations not just of law but of agency rules, regulations and policies. In the second place, the provision preserving the right of employees to report directly to the DNI, Attorney General, IOB or intelligence committees is unnecessary, because nothing in the bill would preclude such action in any event. Thirdly, it is not apparent how the Attorney General would discharge his duty to "take all necessary steps" to protect whistleblowers against reprisals. And finally, there is a concern that the proposed provisions could have the effect of conferring immunity against adverse personnel actions on employees who report information of possible wrongdoing, even when the action and the report are totally unrelated.

In place of subsection (j), the working group would add a new provision to subsection (g), which concerns the oversight responsibilities of heads of intelligence entities, requiring that employees be instructed to cooperate fully with the IOB and the Attorney General in the performance of their functions, and to report any violations of law to their respective general counsels, inspectors general or entity heads. Protection of whistleblowers would be accommodated by a provision that "no employee who so reports in good faith shall be subject to adverse personnel action solely on account of such reporting."

B. LEGISLATIVE BRANCH. Title I, as now written, is replete with requirements that various and sundry matters be reported to the HPSCI and the SSCI. These requirements, 20 in all, are identified and described in summary fashion in the table attached as Tab 5. As has been indicated earlier in this paper, there has been a clear indication on the part of the SSCI staff of a willingness to delete any or all of these requirements and to rely entirely on the umbrella provisions of Section 152(a), which set forth broad obligations on the part of heads of intelligence entities to keep the SSCI and HPSCI "fully and currently informed" and, as may be requested by the committees, "furnish any information or material" in their custody or control. As the SSCI staff sees it, and the working group agrees, these provisions are sweeping enough to accomplish in one place all and more than would be accomplished by the many separate reporting requirements. That is, the committees could count on obtaining at their request, the same reports and information that they would receive under the specific requirements, making the latter unnecessary.

As it would be modified by the working group (by, among other things, adding a new subsection regarding reporting of questionable intelligence activities, to replace a provision deleted from Section 151), Section 152(a) would closely approximate Section 3-4 of E.O. 12036. The difference lies in the introductory statements that qualify the obligations. The issue has to do with the significance of that difference.

Section 3-4 of E.O. 12036 provides that the obligations to keep the committees "fully and currently informed" and to "furnish all information and material" will be performed:

> Under such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods.... (Emphasis added).

The bill, by comparison, omits the underlined phrases and provides only that the performance of the obligations will be:

> Consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches.

Issue. Is the Introductory Statement in Section 152(a) Acceptable.

Commentary. The reference to sources and methods which has been omitted in the bill appears to be duplicative and would be included, in any event, in the meaning of the phrase "all applicable authorities and duties," as would all other statutory responsibilities. And the Justice Department agrees that substituting "[T]o the extent not inconsistent with" for "[C]onsistent with" will make clear that the provision in the bill is not intended to be a waiver of any of the Executive's Constitutional authorities. It is likely this substitution will be agreeable to the Congress since this would merely amount to a confirmation of existing prerogatives.

By accepting reinsertion of the phrase "[U]nder such procedures as the President may establish," however, the Congress would be adding to the Executive's authorities in this regard at the expense of its own. On the other hand, from the point of view of the President, the omission of this language is of no legal significance. The basic authority of the President to invoke Executive Privilege is derived from the Constitutional

authorities inhering to the Office and cannot be supplemented by the language of an Executive Order. Consequently, the basic force and scope of this authority will not be reduced under the bill merely because the "procedures" language from E.O. 12036 is not included. The President would still be free to promulgate procedures for implementation of these reporting requirements after the enactment of this provision and such procedures would be valid to the same extent as would be the case prior to its enactment.

In other words, as slightly modified by the working group, Section 152(a) represents neither a loss in the President's authority to withhold information from the Congress, and more particularly the two intelligence oversight committees, nor a gain in the power of the Congress to obtain such information. It merely leaves the respective prerogatives of the two branches where it finds them, which is as the working group believes it should be.

VII. NONOVERSIGHT ROLE OF CONGRESS

Description. Section 103 states that one of the purposes of the Act is to ensure that the executive and the legislative branches of government are provided information necessary to make informed decisions and to protect the interests of the United States. Section 114, in subsections (c) and (f)(1), places upon the Director of National Intelligence the primary responsibility to provide both branches with the national intelligence information required to fulfill their constitutional and legal obligations.

Nature of the Issue. The difficulty here is whether the bill should contain provisions which either recognize or heighten, depending upon the manner in which they are read, the extent to which Congress shares the intelligence information available to the executive branch.

Commentary. These provisions are interpreted by some members of the working group to imply that the Congress is being elevated to a standing as a consumer essentially coextensive with that of the various departments and agencies in the executive branch. On that basis it is urged that this language be deleted to prevent a passive consumer's role from developing into an active assigning of preferences and requirements. There are others who believe these items in the bill merely reflect the reality of the current situation in which Congress is by and large furnished with such intelligence information as it requests and which it "needs" to perform its legislative functions. Thus, the mere inclusion of this language does not alter the relationship between the intelligence community and the Congress and provides little additional leverage by which to affect that relationship.

By way of comparison, at its 15 May meeting concerning other parts of the bill, the SCC considered Section 413(c) of Title IV, the CIA charter, which would require the Agency to "produce, analyze and disseminate foreign intelligence necessary to meet the needs of the President, the National Security Council, the Congress, and other departments and agencies ...." (emphasis added). It was feared this provision might authorize Congress not merely to receive intelligence but also to impose collection and production requirements on CIA. The SCC decided that language which appears to provide the Congress with more than mere oversight responsibility should be opposed. The Title I language appears to be somewhat less threatening than the Title IV provision in that it does not state the responsibility in terms of producing, analyzing and disseminating to meet the needs of Congress as is the case in Section 413(c), but merely makes it a responsibility of the DNI to provide information needed by the Congress.

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B. Sections 151 and 152 Compared to E.O. 12036

IAB B

Sec. 151(a) The President shall establish a board to be known as the Intelligence Oversight Board (hereinafter in this section referred to as the "Oversight Board") composed of three members who shall be appointed by the President from outside the Government, by and with the advice and consent of the Senate. No member of the Oversight Board shall have any personal interest in any contractual relationship with any entity of the intelligence community. One member of the Oversight Board shall be designated by the President to serve as chairman.

Section 3-101 of E. O. 12036 provides:

Membership. The President's Intelligence Oversight Board (IOB shall function within the White House. The IOB shall have three members who shall be appointed by the President and who shall be from outside the government and be qualified on the basis of ability, knowledge, diversity of background and experience. No member shall have any personal interest in any contractual relationship with any agency within the Intelligence Community. One member shall be designated by the President as chairman.

* * *

Sec. 151(b) The Oversight Board is authorized to employ such personnel as may be necessary to assist in carrying out its functions under this title. No person who serves on the staff of the Oversight Board shall have any contractual or employment relationship with any entity of the intelligence community.

Section 3-103 of E. O. 12036 provides:

Restriction on Staff. No person who serves on the staff of the IOB shall have any contractual or employment relationship with any agency within the Intelligence Community.

* * *

Sec. 151(c) The Oversight Board shall, upon request, be given access to all information and materials relevant to the Oversight Board's functions under this title which are in the possession, custody, or control of any entity of the intelligence community.

Section 1-713 of E. O. 12036 provides that senior officials of the Intelligence Community shall "[i]nstruct their employees to cooperate fully with the Intelligence Oversight Board."

Section 3-203 of E. O. 12036 requires Inspectors General and General Counsels to "[p]rovide to the IOB information requested concerning the legality or propriety of intelligence activities within their respective agencies."

* * *

Sec. 151(d)(1) It shall be the function of the Oversight Board to --

(1) promptly forward to the Attorney General any report received concerning any intelligence activity in which a question of legality has been raised or which the Oversight Board believes raises a question of legality;

Section 3-102(d) of E. O. 12036 makes it a duty of the IOB to "[f]orward to the Attorney General, in a timely manner, reports received concerning intelligence activities in which a question of legality has been raised or which the IOB believes to involve questions of legality."

* * *

Sec. 151(d)(2)

(2) report in a timely manner to the President, and, as appropriate, to the Attorney General and the Director, any intelligence activity of any entity of the intelligence community which the Board believes raises a serious question of legality;

Section 3-102(c) of E. O. 12036 makes it a duty of the IOB to "[r]eport periodically, at least quarterly, to the President on its findings; and report in a timely manner to the President any intelligence activities that raise serious questions of legality or propriety."

* * *

Sec. 151(d)(3)

(3) report in a timely manner to the President, and, as appropriate, to the Director, any intelligence activity the Board believes raises a serious question of propriety;

See Section 3-102(c) of E. O. 12036

Sec. 151(d)(4)

(4) conduct such inquiries into the intelligence activities of any entity of the intelligence community as the Oversight Board deems necessary to carry out the Oversight Board's functions under this title;

Section 3-102(e) of E. O. 12036 makes it a duty of the IOB to "[c]onduct such investigations of the intelligence activities of agencies within the Intelligence Community as the Board deems necessary to carry out its functions under this Order."

* * *

Sec. 151(d)(5)

(5) review periodically the practices and procedures of the inspectors general and general counsels of the intelligence community designed to discover and report intelligence activities that raise questions of legality or propriety;

Section 3-102(a) of E. O. 12036 makes it a duty of the IOB to "[r]eview periodically the practices and procedures of the Inspectors General and General Counsel with responsibilities for agencies within the Intelligence Community for discovering and reporting to the IOB intelligence activities that raise questions of legality or propriety, and consider written and oral reports referred under Section 3-201."

* * *

Sec. 151(d)(6)

(6) review periodically with each entity of the intelligence community that entity's internal rules, regulations, procedures, and directives concerning the legality or propriety of intelligence activities in order to ensure the adequacy of such rules, regulations, procedures, and directives; and

Section 3-102(b) of E. O. 12036 makes it a duty of the IOB to "[r]eview periodically for adequacy the internal guidelines of each agency within the Intelligence Community concerning the legality or propriety of intelligence activities."

Sec. 151(d)(7)

(7) report periodically to the President, and as the Oversight Board deems appropriate, to the Director, the Attorney General, heads of the entities of the intelligence community, and the inspectors general and the general counsels of the entities of the intelligence community on the Oversight Board's findings.

See Section 3-102(c) of E. O. 12036.

* * *

Sec. 151(e)(1) The inspector general and general counsel of each entity of the intelligence community shall --

(1) report, in a timely manner and at least quarterly, to the Oversight Board and the head of such entity any intelligence activity that such inspector general or general counsel believes raises any question of legality or propriety and report, as appropriate, any subsequent findings on such activities to the Oversight Board and the head of such entity;

Section 3-201 of E. O. 12036 provides that Inspectors General and General Counsels shall "[t]ransmit timely reports to the IOB concerning any intelligence activities that come to their attention and that raise questions of legality or propriety."

* * *

Sec. 151(e)(2)

(2) report promptly to the Oversight Board and the head of such entity actions taken, if any, with respect to the Oversight Board's findings, if any, concerning any intelligence activity that was reported pursuant to paragraph (1);

Section 3-202 of E. O. 12036 makes it a duty of Inspectors General and General Counsels to "[p]romptly report to the IOB actions taken concerning the Board's findings on intelligence activities that raise questions of legality or propriety."

Sec. 151(e)(3)

(3) provide to the Oversight Board any information requested by such Board relevant to such Board's functions under this title;

Section 3-203 of E. O. 12036 makes it a duty of Inspectors General and General Counsels to "[p]rovide to the IOB information requested concerning the legality or propriety of intelligence activities within their respective agencies."

* * *

Sec. 151(e)(4)

(4) formulate practices and procedures for discovering and reporting intelligence activities that raise questions of legality and propriety; and

Section 3-204 of E. O. 12036 is identical.

* * *

Sec. 151(e)(5)

(5) report to the Oversight Board, the Director, the Attorney General, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on any occasion on which such inspector general or general counsel is directed by the head of the entity concerned not to report to the Oversight Board on any activity that such inspector general or general counsel believes raises a question of legality or propriety and on any occasion when such inspector general or general counsel is denied access to information or denied authority to investigate a particular matter by the head of the entity concerned.

Section 3-205 of E. O. 12036 provides that Inspectors General and General Counsels shall "[r]eport to the IOB any occasion on which the Inspectors General or General Counsel were directed not to report any intelligence activity to the IOB which they believed raised questions of legality or propriety."

Sec. 151(f)(1) The Attorney General shall --

(1) report, in a timely manner, to the Oversight Board any intelligence activity that raises any question of legality which had not been previously reported to the Attorney General by the Oversight Board;

No counterpart.

* * *

Sec. 151(f)(2)

(2) report periodically to the President, the Director, the heads of the appropriate entities of the intelligence community, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on any intelligence activity that the Attorney General believes raises a question of legality;

Section 3-302 of E. O. 12036 requires the Attorney General to "[r]eport to the President in a timely fashion any intelligence activities which raise questions of legality."

* * *

Sec. 151(f)(3)

(3) report periodically to the President, the Oversight Board, the Director, the heads of the appropriate entities of the intelligence community, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on decisions made or actions taken in response to reports of intelligence activities;

Section 3-303 of E. O. 12036 requires the Attorney General to "[r]eport to the IOB and to the President in a timely fashion decisions made or actions taken in response to reports from agencies within the Intelligence Community forwarded to the Attorney General by the IOB."

Sec. 151(f)(4)

(4) keep the Oversight Board, the Director, the heads and the inspectors general and general counsels of entities of the intelligence community, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate informed regarding legal opinions of the Department of Justice affecting the operations of the intelligence community; and

Section 3-304 of E. O. 12036 requires the Attorney General to "[i]nform the IOB of legal opinions affecting the operations of the Intelligence Community."

* * *

Sec. 151(f)(5)

(5) transmit annually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a written report identifying and describing any intelligence activity during the preceding year which the Attorney General believes constituted a violation of any right guaranteed or protected by the Constitution or laws of the United States or which the Attorney General believes constituted a violation of United States law, Executive order, Presidential directive, or Presidential memorandum, and describing corrective actions that have been taken or are being planned.

No counterpart.

* * *

Sec. 151(g)(1) The head of each entity of the intelligence community shall --

(1) keep the Director and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate informed of intelligence activities that raise questions of propriety and of findings by that entity's inspector general or general counsel on such activities;

Section 3-4 of E. O. 12036 provides that "[u]nder such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

> 3-403. Report in a timely fashion to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate information relating to intelligence activities that are illegal or improper and corrective actions that are taken or planned."

* * *

Sec. 151(g)(2)

> (2) keep the Director and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate informed of actions taken, if any, with respect to findings by the Oversight Board, if any, concerning any intelligence activity that was reported pursuant to subsection (e)(1);

See Section 3-403 of E. O. 12036.

* * *

Sec. 151(g)(3)

> (3) insure that the inspector general and the general counsel of that entity have access to any information necessary to perform their functions under this Act;

Section 1-714 of E. O. 12036 requires senior intelligence agencies officials to "[e]nsure that the Inspectors General and General Counsel of their agencies have access to any information necessary to perform their duties assigned by this Order."

Sec. 151(g)(4)

(4) provide to the Attorney General, in accordance with applicable law, any information required by the Attorney General to fulfill the Attorney General's responsibilities under this Act; and

No true counterpart but see Section 1-706 of E. O. 12036.

* * *

Sec. 151(g)(5)

(5) provide, immediately, to the Attorney General, the Director, the Oversight Board, and the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate an explanation, in writing, of any instance in which the inspector general or general counsel of that entity was denied access to information, instructed not to report to the Oversight Board on a particular activity, or was denied authority to investigate a particular activity.

No counterpart.

* * *

Sec. 151(h) Notwithstanding any other provision of this section, the head of each entity of the intelligence community and the inspector general and general counsel thereof shall have primary responsibility for insuring the legality and propriety of the activities of that entity.

No exact counterpart but see Section 1-701 of E. O. 12036.

* * *

Sec. 151(i)(1) The head of each entity of the intelligence community shall with respect to that entity --

(A) report to the Attorney General, pursuant to section 535 of title 28, United States Code, and the Oversight Board, immediately upon discovery, and evidence of possible violation of Federal law by any officer or employee of that entity;

Section 1-706 of E. O. 12036 provides that senior intelligence officials shall "[r]eport to the Attorney General evidence of possible violations of federal criminal law by an employee of their department or agency, and report to the Attorney General evidence of possible violations by any other person of those federal criminal laws specified in guidelines adopted by the Attorney General."

* * *

Sec. 151(i)(1)(B)

(B) notify, in a timely manner, the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate that the Attorney General and the Oversight Board have been notified pursuant to clause (A) of this paragraph; and

No counterpart.

* * *

Sec. 151(i)(1)(C)

(C) report to the Attorney General any evidence of possible violation by any other person of any Federal law specified in guidelines issued by the Attorney General pursuant to section 151(i)(2)(C).

See Section 1-706 of E. O. 12036.

* * *

Sec. 151(i)(2) The Attorney General shall --

(A) submit a full report, in a timely manner, to the President, the Oversight Board, the Director, and the head of the entity concerned on any determinations made by the Attorney General with respect to reports of possible violations described in paragraph (1)(A) of this subsection;

No counterpart.

Sec. 151(i)(2)(B)

(B) submit, with due regard to the investigative and prosecutorial responsibilities of the Attorney General, a full report, in a timely manner, to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate on any determinations by the Attorney General, including any determination not to prosecute because of questions relating to the classification of information or material, with respect to possible violations reported pursuant to paragraph (1)(A) of this subsection; and

No counterpart.

* * *

Sec. 151(i)(2)(C)

(C) issue guidelines governing the reporting by officers and employees of entities of the intelligence community of evidence of violations of Federal law by individuals who are not officers or employees of any entity of the intelligence community.

See Section 1-706 of E. O. 12036.

* * *

Sec. 151(j)(1) Any officer or employee of any entity of the intelligence community having information on any past, present, or proposed intelligence activity which appears to be in violation of the Constitution or laws of the United States, or of any Executive order, Presidential directive, Presidential memorandum, or rule or regulation or policy of such entity, or possessing any evidence of any possible violation of Federal law by any officer or employee of any entity of the intelligence community, shall provide such information or evidence to the inspector general, general counsel, or head of such entity. If such information or evidence is not initially provided to the general counsel of the entity concerned, the general counsel shall be notified by the head of such entity or by the inspector general of such entity.

No counterpart.

Sec. 151(j)(2)

(2) The Director shall regularly, but not less often than once each year, notify officers and employees of the intelligence community of (A) their duty to provide any information or evidence described in paragraph (1), (B) the officer or officers to whom such information or evidence should be provided, and (C) the necessity for fully cooperating with the Oversight Board and the Attorney General.

No exact counterpart but see Sections 1-704 and 1-713 of E. O. 12036.

* * *

Sec. 151(j)(3)(A)

(A) Nothing in this section shall prohibit any employee of an entity of the intelligence community from reporting any information or evidence described in this paragraph directly to the Director, the Attorney General, the Oversight Board, or to the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate.

No counterpart.

* * *

Sec. 151(j)(3)(B)

(B) The Attorney General shall take all steps necessary to insure that no employee who, in good faith, communicates information or evidence in such a fashion, or who communicates such information or evidence to a superior shall be subject, on account of the reporting of such information or evidence, to discipline through dismissal, demotion, transfer, suspension, reassignment, reprimand, admonishment, reduction-in-force, or other adverse personnel action, or the threat thereof.

No counterpart.

Sec. 151(k) The head of each entity of the intelligence community shall, with respect to that entity, transmit annually to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a written report in which the head of the entity shall identify and describe any intelligence activity of the entity during the preceding year which the head of the entity believes constituted a violation of any right guaranteed or protected by the Constitution or laws of the United States or which the head of the entity believes constituted a violation of United States law, Executive order, Presidential directive, or Presidential memorandum, and describing corrective actions that have been taken or are being planned.

No exact counterpart but see Section 3-403 of E. O. 12036.

* * *

Sec. 152(a) Consistent with all applicable authorities and duties, including those conferred by the Constitution upon the executive and legislative branches, the heads of each entity of the intelligence community, with respect to the intelligence activities of that entity shall --

(1) keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed of all the national intelligence activities and all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any entity of the intelligence community, including any significant anticipated intelligence activity; but the foregoing provision shall not constitute a condition precedent to the initiation of any such anticipated intelligence activity; and

(2) furnish any information or material in the possession, custody, or control of the Director or the relevant entity of the intelligence community or in the possession, custody, or control of any person paid by the Director or by any such entity whenever requested by the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate.

Section 3-4 of E. O. 12036 provides that "[u]nder such procedures as the President may establish and consistent with applicable authorities and duties, including those conferred by the Constitution upon the Executive and Legislative Branches and by law to protect sources and methods, the Director of Central Intelligence and heads of departments and agencies of the United States involved in intelligence activities shall:

Section 3-4 of E. O. 12036 continued

3-401. Keep the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate fully and currently informed concerning intelligence activities, including any significant anticipated activities which are the responsibility of, or engaged in, by such department or agency. This requirement does not constitute a condition precedent to the implementation of such intelligence activities;

3-402. Provide any information or document in the possession, custody, or control of the department or agency or person paid by such department or agency, within the jurisdiction of the Permanent Select Committee on Intelligence of the House of Representatives or the Select Committee on Intelligence of the Senate, upon the request of such committee.

* * *

Sec. 152(b) The head of each entity of the intelligence community shall submit to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate, at least annually, a report which includes a review of the intelligence activities of the entity.

No exact counterpart but see Section 3-401 of E. O. 12036.

* * *

Sec. 152(c) The Director shall maintain a complete record of all legal authorities, published regulations, and published instructions pertaining to the national intelligence activities of the United States; and the head of each entity of the intelligence community shall maintain a complete record of all legal authorities, published regulations, and published instructions pertaining to the intelligence activities of that entity. An index of each such record shall be maintained in the Office of the Federal Register, National Archives and Records Service, General Services Administration, under security standards approved by the Director.

No counterpart.

Sec. 152(d) The Director shall maintain a full and complete record regarding the national intelligence activities of the United States; and the head of each entity of the intelligence community shall maintain a full and complete record regarding the intelligence activities of such entity.

No counterpart.

* * *

Sec. 152(e) The head of each entity of the intelligence community, with respect to the records of that entity of the intelligence community, shall, to the maximum extent practicable and consistent with guidelines established by the Administrator of General Services, provide for the necessary destruction of records at regular periodic intervals. No record regarding the activities of any entity of the intelligence community may be destroyed unless the head of the entity of the intelligence community concerned has given written notification of the proposed destruction, including a description of the records, to the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate at least sixty days prior to implementation.

No counterpart.

* * *

Sec. 152(f) The head of each entity of the intelligence community, with respect to the intelligence activities of that entity, shall promptly provide the Permanent Select Committee on Intelligence of the House of Representatives and the Select Committee on Intelligence of the Senate a copy of all rules, regulations, procedures, and directives issued to implement the provisions of this Act and notify such committees, in a timely fashion, of any waivers of such rules, regulations, procedures, and directives, and the facts and circumstances of each such waiver.

No counterpart.

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Reports to SSCI and HPSCI
Required by Title I of S.2525

Section	Subject Matter	Responsibility	Frequency
114(b)	National intelligence quality and efforts to improve it.	DNI	Annually
114(j)	Proposed agreements with foreign services	DNI	Prior to effectiveness
114(n)	Exercise of DNI termination authority	DNI	Periodic
116(c)(2)	Waiver of provisions of Federal Advisory Committee Act	DNI, AG, entity heads	As exercised
122(b)	Unvouchered funds expenditures	DNI	Quarterly
123(e)	Authority to exempt from GAO audit	DNI	Semiannually & as exercised
151(e)(5)	Occasions when agency heads direct Inspectors Gen. & General Counsels not to report particular activities to the IOB	General Counsels & Inspectors General	Whenever such an occasion may arise
151(f)(2)	Intelligence activies believed by the Attorney General to raise questions of legality	Attny General	Periodic
151(f)(3)	Decisions made or actions taken by the Attorney General in response to reports of intelligence activities	Attny General	Periodic
151(f)(4)	Department of Justice legal opinions affecting the operations of the intelligence community	Attny General	Unstated period. Requirement is to keep the two committees informed

Section	Subject Matter	Responsibility	Frequency
151(f)(5)	Description of each intelligence activity believed by the Attorney General to consitute a violation of any Constitutional right, any law of the U.S., or any Executive Order or Presidential directive or memorandum, and a description of corrective actions taken or planned	Attny General	Annual
151(g)(1)	Intelligence activities that raise questions of propriety, together with findings by Inspectors General or General Counsels respecting such activities	Agency heads	Unstated. The requirements is keep the two committees informed
151(g)(2)	Actions taken with respect to IOB findings	Agency heads	Unstated. As above
151(g)(5)	Explanations of any instances in which Inspectors General or General Counsels were denied access to information, denied authority to investigate a particular activity, or instructed not to report to the IOB	Agency heads	Immediately
151(i)(1)(B)	Notifications of reports made pursuant to 28 U.S.C. §535	Agency heads	In a timely manner
151(i)(2)(B)	Determinations made, including decisions not to prosecute for national security reasons, in relation to possible violations reported pursuant to 28 U.S.C. §535	Attny General	In a timely manner and "with due regard to the investigative and prosecutorial responsibilities of the Attorney General"
151(k)	Descriptions of any intelligence activity believed to constitute a violation of any Constitutional right, any law of the U.S., or any Executive Order or Presidential directive or memorandum, and a description of corrective actions taken or planned	Agency heads	Annual

Section	Subject Matter	Responsibility	Frequency
152(b)	Review of the intelligence activities of the entity	Agency heads	Annual
152(e)	Notifications of proposed destruction of records, together with a description of the records proposed to be destroyed	Heads of agencies	At least 60 days prior to actual destruction
152(f)	Copies of all rules, regulations procedures, and directives issued to implement the Act, and notifications of any waivers in the surrounding facts and circumstances	Agency heads	"Promptly" as to the regulatory material and "in a timely fashion" as any waivers